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No. 346

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA.

TRANSCRIPT OF RECORD.

In Error to the District Court of the United States, for the District of Alaska.

Records of circuit

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The United States, }
District of Alaska. } ss.

Pleas and proceedings began and had in the District Court of the United States for the District of Alaska, at the adjourned November term, 1896.

Present: The Honorable ARTHUR K. DELANEY, Judge.

THE UNITED STATES,
Plaintiff,
vs.
ARCHIE SHELP and GEORGE CLEVELAND,
Defendants.
} No. 427.

The United States of America, }
District of Alaska. }

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA,

vs.

ARCHIE SHELP and GEORGE CLEVELAND,

23 U. S. Statutes at Large, Chapter 53, Section 14.

Indictment.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand eight hundred and ninety-four, begun and holden at Juneau, in said District.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, accuse Archie Shelp and George Cleveland by this indictment of the crime of unlawfully selling intoxicating liquors within said District, committed as follows: The said Archie Shelp and George Cleveland, at or near Chilcoot, within the said district of Alaska, and within the jurisdiction of this Court, on or about the 18th day of August in the year of our Lord one thousand eight hundred and ninety-four, did un-

lawfully and willfully sell to Alaska Indians, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor called whisky, to-wit, one pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors unknown; without having first complied with the law concerning the sale of intoxicating liquors, in the District of Alaska.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid upon their oaths do say: That Archie Shelp and George Cleveland did then and there unlawfully sell intoxicating liquors to-wit, whisky, in the manner and form aforesaid, to the said Alaska Indians contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

LYTTON TAYLOR,
United States District Attorney.

[Endorsed]: No. 427. United States of America vs. Archie Shelp and George Cleveland. Indictment for violating S. 14, ch. 53, 23 U. S. Stat. at A. A true bill. B. M. Behrends, Foreman of Grand Jury. Witnesses examined before the Grand Jury, Au-ta-iet (Chilkoot)

Eddie "
Dave "

Filed Dec. 6, 1894. Charles D. Rogers, Clerk. Lytton Taylor, U. S. Attorney.

And afterwards, to-wit, on the 2nd day of December, 1895, the following further proceedings were had and appear of record in said cause which are words and figures following, to-wit:

UNITED STATES,

vs.

GEORGE CLEVELAND and ARCHIE SHELP.

No. 427.

Plea.

Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, and the defendant, George Cleveland being personally present and his counsel, John F. Malony, Esq., waives arraignment and further time to plead, and enters a plea of "not guilty" to the indictment.

And afterwards, to-wit, on April 15th, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Trial.

This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally in court, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the venire of the petit jury was called by the clerk. and the jurors sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues: J. C. Hoffman, Ira Lee, H. M. Woodruff, John Calhoun, James Atkinson, Peter Hahn, J. F. Lindsey, J. D. Douglass, Wm. Shuler, O. H. Adsit, Victor Lindquist, John McPherson, and the evidence being heard in part and there not being time to complete the hearing of said cause, the same is continued until 9 o'clock A. M. Thursday, April 16, 1896.

And afterwards, to-wit, on Thursday, April 16, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

The jury in the above-entitled cause having come into court and being called by the clerk, and all answering, the plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, the defendants being present, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the jury rendered the following verdict:

The United States of America, }
District of Alaska. }

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA,

vs.

ARCHIE SHELP and GEORGE CLEVELAND.

Verdict.

Special session commencing March 30, 1896.

We, the jury empaneled and sworn in the above-entitled

cause, find the defendant guilty as charged in the indictment.

J. D. DOUGLAS,
Foreman.

It is therefore ordered by the Court that the jury be discharged from further attendance in this cause and that the defendants be required to furnish recognizance in the sum of five hundred dollars for appearance before this Court for sentence.

And afterwards, to-wit, on April 17, 1896, defendants filed their motion in arrest, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP.
Defendants.

Motion in Arrest of Judgment.

Come now the defendants above named and move the Court to arrest the judgment in the above-entitled cause upon the following ground, to-wit:

First. That the indictment in said cause does not state facts sufficient to constitute a crime against the laws of the United States.

J. F. MALONY,
JNO. TRUMBULL,
Attorneys for Defendants.

[Endorsed]: No. 427. U. S. District Court for the Dist. of Alaska. United States v. George Cleveland and Archie Shelp. Motion in arrest.

Filed April 17, 1896. Charles D. Rogers, Clerk. J. F. Malony and John Trumbull, Attorneys for Defts.

And afterwards, to-wit, on April 17, 1896, defendants filed their motion for a new trial, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES, Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP. Defendants.

Motion for New Trial.

Come now the defendants above named and move the

Court to vacate and set aside the verdict in the above-entitled cause and to grant a new trial upon the following grounds, to-wit:

First. Irregularity in the proceedings of the court and abuse of discretion by the Court, by which the said defendants were prevented from having a fair trial.

Second. Misconduct on the part of the prevailing party, in this, that the United States attorney in his statement of the case to the jury, that as a result of the acts with which the defendants were charged, that a murder had been committed, and in his opening address to the jury after the evidence had been closed, although no evidence had been introduced of a murder, the United States attorney stated to the jury that a murder had been committed, which was the result of the acts charged against the defendants in the indictment, and stated to the jury, that the defendants went to the Indian village at Hoona, and sold whisky to the Indians there, although the defendants were not charged in the said indictment with selling liquor at any place but at Chilchute, and although there was no evidence that the defendants had stopped at Hoona, or had sold liquor there.

Third. Surprise which ordinary prudence could not have guarded against.

Newly discovered evidence. Material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

Fifth. Insufficiency of the evidence to justify the verdict, and that the verdict is against law, in this, to-wit:

That the evidence for the prosecution showed that the persons who sold the liquor to the Indians at Chilkoot were two men whom the Indians had never seen before, whom they describe as the older one having a full beard and the younger one having a mustache and a small growth of beard, while the evidence indisputably shows that at the time the alleged transactions took place the defendant Cleveland had neither a beard or a mustache and the defendant Shelp wore only a mustache. The evidence is further insufficient in this that it appears from the undisputed evidence of Gus Lungren, that the defendants were at Funter Bay, on the 16th and 17th days of August, 1894, about eighty or ninety miles from Chilkoot, and that they left on the morning of the 17th in their sloop; the evidence of William Raymond shows conclusively that the defendants arrived at Bartlett Bay on the morning of the 18th of August; that Bartlett Bay is about forty miles from Funter Bay; that the defendants stayed at Bartlett Bay until the morning of the 19th; and that Bartlett Bay is one hundred and eight miles from Chilkoot, and that the trip from Bartlett Bay to Chilkoot in a sail boat could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot, at any time from the 16th to the 22nd day of August. It further appearing from the evidence of Mr. Ross, the ex-deputy marshal, that the Indians arrived from Chilkoot at Juneau on the 20th of August, and reported the murder which had been committed there and the fact of the sale of whisky to them by two unknown men; that the trip from Chilkoot to Juneau could not be made in less than

two days, so that it manifestly appears that the whisky was sold to them at a time when by the uncontradicted testimony it was a physical impossibility that the defendants could be at Chilkoot.

Sixth. Error in the law occurring at the trial and excepted to by these two defendants, in this, to-wit:

That the Court allowed six Indian witnesses to testify over the objection of the defendants whose names were not indorsed on the indictment upon the direct examination. That no notice was given these defendants that any other witnesses would be called other than those whose names were endorsed upon the indictment. That the Court erred in overruling the defendants' motion for a nonsuit or peremptory instruction to the jury to bring in a verdict for the defendants after the plaintiff had rested its case. The Court erred under the circumstances of this case in instructing the jury that the evidence of an Indian witness was entitled to as much credit as the evidence of a white man, and more especially in this as such instruction was given by the Court with a reference by the Court to the argument of one of the defendants' council, who had stated in his argument to the jury in discussing the weight of evidence "that the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of our religious ideas from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as a witness

whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalty of perjury." The Court erred under the circumstances of this case in instructing the jury that there was no evidence that these defendants had located any mining claims, and in stating to the jury in that connection that it was for them to judge whether the defendants were out prospecting as honest miners or prospecting for the aboriginal native.

Said motion is made upon the records and files of this cause and upon affidavits herewith filed.

J. F. MALONY, and
JNO. TRUMBULL,
Attorneys for Defendants.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, v. George Cleveland and Archie Shelp, Defendants. Motion for a new trial.

Filed April 17, 1896. Charles D. Rogers, Clerk. John F. Malony and John Trumbull, Attorneys for Defts.

And afterwards, to-wit, on April 18, 1896, defendants filed affidavits in support of their motion for a new trial, which are in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP.
Defendants.

Affidavit of W. H. Moran.

District of Alaska. } ss.
United States, }

W. H. Moran, being first duly sworn, deposes and says: My name is W. H. Moran; I am over twenty-one years of age and reside at Treadwell's, on Douglass Island, District of Alaska. On the twenty-second day of August, 1894, I saw George Cleveland and Archy Shelp in Hoona Sound, District of Alaska; that the place at which I saw them in Hoona Sound was at least thirty-five miles out of the direct way if one was going from Bartlett Bay to Chilkoot. That they stayed in and around Hoona Sound for about six days. I was on board their sloop several times while they were there, and saw no indications of them having any liquor on board. They had their miners' tools with them, and to my knowledge were prospecting

at the time in and around Hoona Sound. I have been absent from Alaska between three and four months in the hospital in Seattle, Washington, and arrived in Alaska on the last steamer, "Willapa," about the 9th or 10th of April, 1896; that I did not see either one of the defendants after my arrival until after the jury in this cause had brought in a verdict convicting them of selling whisky at Chilkoot about the 18th day of August, 1894, after which I called upon them, and called their attention to the fact of my seeing them in Hoona Sound at said time.

W. H. MORAN.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.] J. F. MALONY,
Notary Public.

In the United States District Court, in and for the District of Alaska.

Affidavit of George Cleveland.

United States, }
District of Alaska. } ss.

George Cleveland, being duly sworn, deposes and says: I am one of the defendants in the above-entitled action. Subsequent to the trial of said action, to-wit: On the day of the 17th of April, 1896, which will establish the fact of my whereabouts, from the —— day of August, up to the 28th day of August, 1894, that one of said witnesses, W.

H. Moran, will testify that he saw me in company with Archy Shelp in Hoona Sound; that we stayed there for six days prospecting for gold, and not for the aboriginal native; that he was on board our sloop several times; that he saw no liquor on board, and that we had our mining tools and outfit with us; that the reason we did not have the said Moran testify to these facts at our trial was that the last we knew of him he had gone to Seattle, in the State of Washington, and was confined to the hospital at that place. Some three or four months ago when we learned that our trial was coming on I made diligent inquiry for the said Moran, but did not learn of his return to Alaska until the morning of the 17th day of April, 1896, when he came over to see me at Douglas City, and informed me that he had returned on the steamer Willapa about the 10th of this month; that said Moran will further testify that the place at which he saw us in Hoona Sound on the 22nd day of August was at least thirty-five miles out of the direct course to Chilkoot to Bartlett Bay; that I could prove by the evidence of Clarence Stites that he saw myself and Archy Shelp in Hoona Sound, about thirty-five miles from Bartlett Bay, on the 21st day of August, 1894; that he came on board our sloop; that he saw no liquor on board, and that we had our mining tools and outfits with us, and that we were prospecting about the Sound, and that we stayed in that vicinity eight or ten days; that before this trial I made diligent inquiry for the said Clarence Stites, and also before the commencement of this term of court, when I learned there was going to be a term; that from such inquiries I learned that he was at Yakoba Island in the Pacific Ocean, a place which is

almost inaccessible at this season of the year, except for large vessels, and that even if I had had the means to charter such a large vessel there was none to be had in this vicinity; that I did not know of his return until yesterday, April 17th, 1896; that since I have learned of his return I have diligently searched and inquired for him, but so far have been unable to find him; I have been informed that he is out hunting and may not return for several days, and not in time to present his affidavit to this Court, by two o'clock this afternoon as ordered by the Court. Affiant further says that the United States attorney in his opening address to the jury after the evidence had been closed stated as a result of which the defendants were charged, namely: Selling whisky to the Indians at Chilkoot, on or about the 18th day of August, 1894, that a murder had been committed, and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime, although no evidencewhatever had been introduced of any murder having been committed, and stated to the jury that this affiant and co-defendant went to the Indian village at Hoona and sold whisky there, although the defendants were not charged in said indictment with selling liquor at any place except Chilkoot, and although there was no evidence that the defendants had stopped at Hoona or had sold liquor there. Affiant further says that the United States attorney in his said address abused these defendants and attacked their character when they had not put their character in issue and stated to the said jury that if these defendants were the good and innocent men that they tried to make themselves out, why did they

not bring witnesses to testify to their good character. Affiant further says that he believes that these reckless and unwarranted statements made by the United States attorney to the jury influenced the said jury of bringing in a verdict of guilty against this affiant and co-defendant.

GEO. CLEVELAND.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.]

J. F. MALONY,
Notary Public.

In the United States District Court, in and for the District of Alaska.

Affidavit of Archie Shelp

United States, }
District of Alaska. } ss.

Archie Shelp being duly sworn, deposes and says: I am one of the defendants in the above-entitled action. Subsequent to the trial of said action, to-wit, on the day of the 17th of April, 1896, which will establish the fact of my whereabouts from the —— day of August, up to the 28th day of August, 1894, that one of said witnesses, W. H. Moran, will testify that he saw me in company with George Cleveland in Hoona Sound; that we stayed there for six

days prospecting for gold, and not for the aboriginal native; that he was on board our sloop several times, that he saw no liquor on board, and that we had our mining tools and outfit with us; that the reason we did not have the said Moran testify to these facts at our trial was that the last we knew of him he had gone to Seattle, in the State of Washington and was confined to the hospital at that place. Some three or four months ago when we learned that our trial was coming on I made diligent inquiry for the said Moran, but did not learn of his return to Alaska until the morning of the 17th day of April, 1896, when he came over to see me at Douglas City, and informed me that he has returned on the steamer Willapa about the 10th of this month; that said Moran will further testify that the place at which he saw us in Hoona Sound on the 22nd day of August was at least thirty-five miles out of the direct course to Chilkoot to Bartlett Bay.

That I could prove by the evidence of Clarence Stites, that he saw myself and George Cleveland in Hoona Sound, about thirty-five miles from Bartlett Bay, on the 21st day of August, 1894, that he came on board our sloop, that he saw no liquor on board, and that we had our mining tools and outfits with us, and that we were prospecting about the Sound, and that we stayed in that vicinity eight or ten days; that before this trial I made diligent inquiry for the said Clarence Stites and also before the commencement of this term of court, when I learned there was going to be a term. That from such inquiries I learned that he was at Yakoba Island in the Pacific Ocean, a place which is almost inaccessible at this season of the year, except for large vessels, and that even if I had had the means to char-

ter such a vessel there was none to be had in this vicinity. That I did not know of his return until yesterday, April 17th, 1896. That since I have learned of his return I have diligently searched and inquired for him, but so far have been unable to find him. I have been informed that he was out hunting and may not return for several days, and not in time to present his affidavit to this Court, by two o'clock this afternoon as ordered by the Court. Affiant further says that the United States Attorney in his opening address to the jury after the evidence had been closed stated as a result of which the defendants were charged, namely: selling whisky to the Indians at Chilkoot, on or about the 18th day of August, 1894, that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime, although no evidence whatever had been introduced of any murder having been committed, and stated to the jury that this affiant and co-defendant went to the Indian village at Hoona and sold whisky there, although the defendants were not charged in said indictment with selling liquor at any place except Chilkoot, and although there was no evidence that the defendants had stopped at Hoona or had sold liquor there.

Affiant further says that the United States Attorney in his said address abused these defendants and attacked their character when they had not put their character in issue, and stated to the said jury that if these defendants were the good and innocent men that they tried to make themselves out, why did they not bring witnesses to testify to their good character.

Affiant further says that he believes that these reckless and unwarraned statements made by the United States Attorney to the jury influenced the said jury of bringing in a verdict of guilty against this affiant and co-defendant.

ARCHIE SHELP.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.] J. F. MALONY,
Notary Public.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, vs. Archie Shelp, George Cleveland, Defendants. Affidavits on motion for new trial. Filed Apr. 18, 1896. Charles D. Rogers, Clerk. John F. Malony, John Trumbull, Attorneys for defendants.

And afterwards, to-wit, on Saturday, April 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
vs.
ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Judgment.

Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, as also come the de-

fendants in person, with Messrs. J. F. Malony and John Trumbull, their counsel, and appearing for judgment, and the motion for new trial and the motion for arrest of judgment being denied—

It is ordered, adjudged and decreed that defendants be and they are hereby, convicted of the crime of unlawfully selling intoxicating liquor in Alaska and sentenced to imprisonment in the U. S. Jail for the District of Alaska for the term of six calendar months.

And afterwards, to-wit, on May 25, 1896, the defendants filed their Bill of Exceptions in said cause, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND.

Bill of Exceptions.

Be it remembered that afterward, to-wit, on the 16th day of April, in the year of our Lord one thousand eight

hundred and ninety-six, at a special term of said Court, begun and holden in Juneau, in and for the District of Alaska, before his Honor Arthur K. Delaney, the District Judge, the issue joined in the above-stated cause, between the said parties, came on to be tried before the said Judge, and a jury, which was duly empaneled and sworn, to try the issue between the said parties. The plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, and the defendants by John F. Malony, Esq., their attorney, and John Trumbull of counsel. Whereupon the following testimony was offered and introduced on the part of the plaintiff to maintain the issue, and called as a witness Dennis, an Indian, whereupon the defendants objected to the said Dennis being sworn as a witness in the said cause, for the reason that his name was not endorsed upon the indictment, and for the reason that the defendants nor their attorneys had been furnished with a list containing the name of said witness, or in any manner notified that said witness would be called by the plaintiff to testify in said cause, which objections were overruled by the Court, and the witness permitted to be sworn and testify, to which ruling of the Court the defendants then and there excepted, which exceptions were allowed by the Court. Whereupon the said witness was duly sworn, and testified as follows:

My name is DENNIS. I live at Chilkoot. (The District Attorney here pointed out the defendants to the witness and asked the witnes if he knew them.) I know these defendants. I saw them but once, two winters and one summer ago; they were at Chilkoot. Their boat was

anchored off the shore. The younger man (meaning the defendant Cleveland) waved his hat to me, picked up a keg, then drank out of a tin cup. When I came to their boat they gave me whisky to drink, and told me to tell the other people at the village that they had plenty of whisky. I went, and told at the village, and twelve of us came down in a canoe, and got whisky from the white men. I got two bottles, and paid four ($4.00) for it. I never saw the defendants before or since.

Cross-Examination by Mr. Malony.

The defendant Cleveland had a mustache at the time he was at Chilkoot, and small whiskers. The defendant Shelp had whiskers all over his face. I never saw them before or since. The boat was anchored about as far as from here to the sawmill from the land (meaning as far as from Juneau to the mill on Douglas Island). Whereupon the plaintiff called the following witnesses: Goo-Nawk, Dick, Sam-doo, Kassto, Dave, Jim. The defendants objected to the said witnesses being sworn and testifying, with the exception of witness Dave, for the reason that their names were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of the witnesses, or any order of the Court made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment, which objections of the defendants were overruled by the Court, to which ruling of the Court the de-

fendants then and there excepted, which exceptions were allowed by the Court; whereupon all of said witnesses were duly sworn, and testified substantially as the first witness, Dennis, had testified.

Whereupon the plaintiff rested its case, and the defendants moved the Court either for a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground and for the reason that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regard to the sale of intoxicating liquors in Alaska. which motion was overruled and denied by the Court, and to which ruling of the Court the defendants then and there excepted, which exceptions were allowed.

Whereupon the attorneys for the said defendants called as a witness

JOHN C. ROSS, who being duly sworn, testified among other things as follows:

I was Deputy U. S. Marshal, for the District of Alaska, in August, 1894, and resided at Douglas City, near Juneau in said District. I remember the time when the Indians from Chilkoot came to Juneau and made complaint against these defendants for selling whisky to them on the 18th day of August, 1894. The complaint was made on the 20th day of August, 1894, and I started the same afternoon for Chilkoot; the distance from Juneau to Chilkoot is ninety-five miles. The Indians came from Chilkoot to Juneau in canoes. I arrested the defendants on the 3rd day of Sept., 1894. The Indians told me at Chilkoot that the men who sold them liquor wore beards and

mustaches, and that they had never seen them before. (The plaintiff moved that what the Indians told the witness be stricken out, as not the best evidence, which motion was sustained by the Court, and the same ordered stricken, to which ruling of the Court the defendants then and there excepted, which exceptions were allowed.)

Whereupon to maintain the issue on their part the defendant Archy Shelp was called as a witness, who, being duly sworn, testified among other things as follows:

My name is Archy Shelp. I am one of the defendants in this cause. I reside at Douglas, in the District of Alaska. On the 12th day of August, 1894, in company with the defendant George Cleveland, we started from Douglas on a prospecting expedition, in a sloop; we first went to Bear Creek, on Douglas Island, and prospected around there for several days. We left there and arrived at Funter Bay, on Admiralty Island, on the 16th day of August, 1894, and stayed there until the 17th of August. While at Funter Bay, we met one Gus Lungreen, who came aboard our sloop several times. Funter Bay is about ninety miles from Chilkoot; that on the morning of the 17th we left Funter Bay in our sloop and arrived at Bartlett Bay on the morning of the 18th; that Bartlett Bay is about forty miles from Funter Bay; that we stayed at Bartlett Bay until the morning of the 19th of August; while at Bartlett Bay we met one William Raymond, who lives there, and purchased from him some provisions; that Bartlett Bay is about one hundred and eight miles from Chilkoot. On the morning of the 19th of August, 1894, we left Bartlett Bay and went to Hoona Sound, and arrived at Hoona Sound on the morning of the 20th, and

stayed there prospecting around the Sound for eight or ten days; during this time Mr. Cleveland was clean shaven and did not wear either a beard or mustache. I wore only a mustache. I was never at Chilkoot in my life. I never saw, to my knowledge, any of the Indians who testified in this case. When we started out we took our mining tools and outfits with us. We had no whisky on board of our sloop; neither sold or gave away any whisky to Indians.

GEORGE CLEVELAND, being duly sworn on the part of the defendants, testified substantially to the foregoing facts testified to by the defendant Shelp. He further stated as follows:

That it was not true, as stated by the witnesses for the plaintiff, that they did not know him and had never seen him but once. That in 1891 and 1892 he had fished at Chilkoot for the cannery. That he knew said Indians who had testified, and that they knew him. That Hoona Sound was about thirty-five miles out of the direct course from Bartlett Bay from Chilkoot.

Whereupon WILLIAM RAYMOND, being sworn on the part of the defendant, testified as follows:

My name is William Raymond. I live at Bartlett Bay in Alaska, and lived there in August, 1894. I know the defendants. I had never met the defendant Shelp until the 18th of August, 1894, at which time he and George Cleveland came to Bartlett Bay in a sloop. They stopped at Bartlett Bay until the morning of the 19th of August. I was on their sloop several times while they were there.

I saw no indications of them having any liquor on board. I asked them if they had anything to drink; they told me that they had a couple of bottles when they started out but that it was all gone. They had their mining tools and outfit with them, and I understood from them that they were out prospecting. They bought some provisions from me while at Bartlett Bay. They left on the morning of the 19th. The distance from Bartlett Bay to Chilkoot is one hundred and eight miles. The trip could be made from Bartlett Bay to Chilkoot in a boat like the one the defendants had in about three days with average weather.

Cross-Examination by Dist. Attorney.

I remember the date they were at Bartlett Bay from the fact that they bought groceries from me. They offered in payment of the groceries a twenty dollar gold piece. I could not make the change, so I charged the amount of groceries against them in my book, and that is the date of the charge, the 19th day of August, 1894. Mr. Cleveland was clean shaven, wearing neither a beard or a mustache. Mr. Shelp wore a mustache but had no beard. When the defendants left Bartlett Bay on the morning of the 19th they went in the direction of Hoona.

By the Court:

Q. Is there not an Indian village at Bartlett Bay?

A. Yes, sir.

And another at Hoonah?

Yes, sir.

By the Court.—A-h-h! that is all, sir.

Whereupon the defendants to further sustain the issue upon their part called as a witness.

GUS LUNGREN, who being duly sworn, testified among other things as follows:

My name is Gus Lungren. I live at Douglas City in Alaska. On the 16th and 17th days of August, 1894, I was camping at Funter Bay and saw the defendants, Archy Shelp and George Cleveland. They arrived there on the 16th day of August in a sloop, and stayed there until the 17th. I was on board their sloop several times while they were there. I saw no indications of them having liquor on board. They had their mining tools and outfits with them and gave me to understand that they were on a prospecting tour. Funter Bay is about ninety miles from Chilkoot. Mr. Cleveland wore either a beard or a mustache at that time, and had not for some months previous. Mr. Shelp wore a mustache only.

Cross-Examination by Dist. Attorney.

The reason I remember the date was that I left Douglas for Funter Bay on the day that the sawmill burned down at Douglas.

Defendants rest; plaintiff rests.

Whereupon the United States Attorney addressed the jury in behalf of the plaintiff, and among other things stated that the defendants "went to the Indian village at Hoona, and sold whisky there," and also stated to the said jury that "the result of the defendants selling

whisky to the Indians at Chilkoot, on or about the 18th day of Aug., 1894, was that a murder had been committed, and the murderer was now in the penitentiary at San Quentin for that crime," although no evidence was introduced that the defendants sold whisky at Hoona, or that any murder had been committed. The said prosecuting attorney in his said address further stated: "If these defendants were the good and innocent men that they try to make themselves out, why did they not bring witnesses to testify to their good character?" although no evidence had been introduced as to the character of these defendants, and their character was not made an issue by them. Whereupon the counsel for the defendant addressed the jury, and among other things said, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury stated: "That the evidence of ignorant. half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath, as understood by Christian peoples, and who had little or no appreciation of our religious ideas from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury." The argument being closed the Court instructed the jury among other things as follows:

Referring to the remarks of counsel above, the Court instructed the jury as follows:

"It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. In weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities for seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell; and from these things together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies. You have the right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast, going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick, and pan, and shovel, as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native."

To which charge of the Court the defendants then and there excepted on the ground that the same is not the law, is misleading, tending to confuse the jury, and distract their attention from the evidence.

Whereupon the instructions being closed, the jury retired to consider of their verdict, and afterwards, but on the same day, returned into court, and being called answered to their names and say that they had found a verdict, which verdict was "Guilty as charged in the indictment."

Thereupon the defendants by their attorneys gave notice of a motion in arrest of judgment, on the following grounds:

"That the indictment in said cause does not state facts sufficient to constitute a crime against the laws of the United States."

And also filed a motion for a new trial, upon the following grounds:

(Here insert motion for a new trial, and affidavits of Archy Shelp, George Cleveland, and W. H. Moran.) Which motions in arrest of judgment came on for argument and decision on the 20th day of April, 1896, and the argument being closed, the same was submitted to the Court for consideration, and after due deliberation thereon, the Court overrules and denies the said motion, to which ruling and decision of the Court the defendants then and there except.

Whereupon the defendants prayed that this their bill

of exceptions be signed and sealed by the Court, and that same be made a part of the records of this cause, which is accordingly done this 25 day of May, 1896.

ARTHUR K. DELANEY,
Judge.

The foregoing bill of exceptions is correct.

F. D. KELSEY,
Special Assistant U. S. Attorney.
J. F. MALONY and
JNO. TRUMBULL,
Attys. for Defts.

[Endorsed]: No. 427. United States District Court, District of Alaska. United States v. Archy Shelp and George Cleveland. Bill of Exceptions. Original. Filed May 25, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, defendants filed their petition for writ of error, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,

vs.

ARCHY SHELP AND GEORGE CLEVELAND.

Defendants.

Petition for Writ of Error.

Archy Shelp and George Cleveland, the defendants above named, feeling themselves aggrieved by the verdict of the jury, and the judgment entered thereon, on the 20 day of April, 1896, in pursuance of said verdict, whereby it was considered and adjudged that the defendants should be imprisoned in the jail at Sitka, in the Territory of Alaska, for a period of six months.

Come now the said defendants by their attorneys, J. F. Malony and John Trumbull, and petition this Honorable Court for an order allowing them to prosecute the writ of error to the Circuit Court of Appeals of the 9th Circuit, under and according to the laws of the United States in that behalf made and provided, and that all other proceedings in this Court be suspended and stayed until the determination of said writ of error by the said

Circuit Court of Appeals for the 9th Circuit. And your petitioners as in duty bound will ever pray.

J. F. MALONY and
JNO. TRUMBULL,
Attys. for Defendants.

The petition is granted and it is ordered that the writ prayed for issue.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: United States vs. Archie Shelp and George Cleveland. Petition for Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, defendants filed their assignment of errors in said cause, which is in words and figures following, to-wit:

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES,
vs.
ARCHY SHELP and GEORGE CLEVELAND.

Assignment of Errors.

Now come the above named defendants by their attorneys, J. F. Malony and John Trumbull, and say in the

records and proceedings in the above-entitled cause, there is manifest error in this, to-wit:

First: It was error for the Court to overrule the objections of the defendants to the witnesses Dennis, Goonawk, Dick, Samdoo, Casto, and Jim, for the reason that the names of said witnesses were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of said witnesses, and for the further reason that no order of Court was made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment.

Second: It was error for the Court after the plaintiff had rested its case to deny the defendants' motion to a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground that the plaintiff had failed to establish the material allegations of the indictment by evidence, in this, that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regards to the sale of intoxicating liquors in Alaska.

Third: The Court erred in overruling the defendants, motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States.

Fourth: The Court erred in instructing the jury in the manner and under the circumstances as follows, to-wit:

One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses

who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

"That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury."

After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

"It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all

the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native."

Fifth: The Court erred in denying the defendants' motion to vacate the verdict and to grant a new trial, in this, to-wit:

1. Irregularity in the proceedings and abuse of discretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered yes, sir, whereupon the Court in presence of the jury exclaimed "A-h-h. That is all, sir."

2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: "That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the

murder was in the penitentiary at San Quentin for such crime," although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that "The defendants went to the Indian village at Hoona and sold whisky there," although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there.

3. Surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

5. Insufficiency of the evidence to justify the verdict, in this, to-wit, that it appears from the evidence that the defendants were at Funter Bay on the 16th and 17th days of August, 1894, eighty or ninety miles from Chilkoot; that they left on the 17th on their sloop, and arrived at Bartlett Bay on the morning of the 18th: that Bartlett Bay is about forty miles from Funter Bay; that they stayed at Bartlett Bay until the morning of the 19th; that Bartlett Bay is 108 miles from Chilkoot; that the trip from there to Chilkoot could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot at any time from the 16th to the 22nd of August. It further appearing from the evidence of the ex-Deputy Marshal, who went to Chilkoot two days after the alleged whisky selling took place that

the Indians arrived at Juneau on the 20th day of August, 1894, and made the complaint charging the defendants with selling liquor on the 18th day of August, and that the trip from Chilkoot to Juneau could not be made in less than two days.

6. Error in law occurring at the trial and excepted to by the defendants.

Wherefore the said defendants pray that the judgment of the said United States District Court for the District of Alaska be reversed, and that the said District Court be ordered to enter an order directing the discharge of the said defendants, and sustain the motion in arrest of judgment, or that the order of the said District Court denying the defendants' motion for a new trial be ordered reversed and vacated and the judgment rendered in said cause reversed, and a new trial granted.

J. F. MALONY and
JOHN TRUMBULL,
Attorneys for Defendants.

No. 427. In the U. S. District Court for the District of Alaska. United States vs. Archie Shelp and George Cleveland. Assignment of Errors. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on the 9th day of October, 1896, defendants filed their bond on writ of error, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

THE UNITED STATES, Plff.,

vs.

GEORGE CLEVELAND and ARCHIE SHELP, Defts.

Bond.

A judgment having been given on the 18th day of April, 1896, whereby Archie Shelp and George Cleveland were condemned to imprisonment in the jail at Sitka, Alaska, for the term of six months, and they having appealed from said judgment and been duly admitted to bail in the sum of two thousand dollars—

We, Frank Bach and Charles Morse, of Juneau, Alaska, hereby undertake that the above named George Cleveland and Archie Shelp shall prosecute said appeal with diligence and shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal and render themselves in execution thereof, or if

they fail to do so in any particular, that we will pay to the United States the sum of two thousand dollars.

Dated April 1896.

GEORGE CLEVELAND.
FRANK R. BACH.
CHARLES MORSE.
ARCHIE SHELP.

United States,
District of Alaska } ss.

Frank Bach and Charles Morse, being duly sworn, says each for himself, that he is a resident and householder of the District of Alaska, and worth the sum of two thousand dollars over his just debts and liabilities and property exempt from execution.

FRANK R. BACH.
CHARLES MORSE.

Subscribed and sworn to before me this 6th day of May, 1896.

[L. S..] J. F. MALONY,
Notary Public.

Approved this 9th day of October, 1896.

ARTHUR K. DELANEY,
U. S. District Judge.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. The United States, Plaintiff, vs. Archie

Shelp and George Cleveland, Defendants. Bond. Filed October 9th, 1896. Charles D. Rogers, Clerk. John F. Malony and John Trumbull, Attorneys for Defendants.

And afterwards, to-wit, on October 9th, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHY SHELP,
Defendants.

Order Allowing Writ of Error.

The petition of the defendants herein, for an order allowing said defendants to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, coming on regularly to be heard, it is hereby ordered that the said defendants be, and the same is,

hereby allowed to prosecute said writ of error to the said Circuit Court of Appeals for the Ninth District.

Dated Oct. 9, 1896.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, vs. Archy Shelp and George Cleveland, Defendants. Order allowing Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, a writ of error was issued in said cause, which is in words and figures following, to-wit:

Writ of Error.

United States of America, ss.

The President of the United States of America, to the Hon. Arthur K. Delaney, Judge of the District Court of the United States for the District of Alaska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said District Court before you between the United States, plaintiff, and Archy Shelp and George Cleveland, defendants, a manifest error has happened to the great damage

of the said Archy Shelp and George Cleveland, as is said and appears by the complant, we being willing that suc error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the 9th Circuit, at the Court rooms of said Court, in the City of San Francisco, State of California, together with this writ, so that you have the same at the said place before the Justices aforesaid on the 7 day of November next. That the records and proceedings aforesaid being inspected the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 9 day of October, in the year of our Lord, one thousand eight hundred and ninety-six, and of the independence of the United States the one hundred and twenty-first.

[L. S.] CHARLES D. ROGERS,
Clerk of the Dist. Court for the U. S. of America, for the Dist. of Alaska.

The foregoing writ is hereby allowed.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: No. 427. In the District Court of the United States for the District of Alaska. United States vs. Archie Shelp and George Cleveland. Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards to-wit, on the 9th day of October, 1896, there was issued out of said District Court of Alaska a citation, which is in words and figures as follows:

Citation.

United States of America, ss.

To the United States and Burton E. Bennett, United States Attorney, District of Alaska—Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the ninth circuit, to be holden in the city of San Francisco, beginning on the first Monday of October, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Disrict Court of the United States for the District of Alaska, wherein Archy Shelp and George Cleveland are plaintiffs in error and the United States are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 9, 1896.

ARTHUR K. DELANEY,

Judge of the District Court of the United States of the District of Alaska.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. The United States, plaintiff, vs. Archie Shelp and George Cleveland, defendants. Citation. Service of the within citation admitted by copy this 9th day of October, 1896. Burton E. Bennett, U. S. Attorney for the District of Alaska, Attorney for plaintiff. Filed October 9th, 1896. Charles D. Rogers, Clerk. J. F. Maloney and John Trumbull, attorneys for defendants.

Clerk's Certificate to Transcript.

United States,
District of Alaska. } ss.

I, Charles D. Rogers, Clerk of the United States District Court, within and for the District of Alaska, do hereby certify that the foregoing pages, numbered from one to 40, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The United States, plaintiff, vs. Archie Shelp and George Cleveland, defendants, as the same remain of record and on file in said office.

In testimony, whereof, I have caused the seal of said Court to be hereunto affixed, at the town of Sitka, in said District, the 9th day of October, A. D. 1896.

[Seal.] CHARLES D. ROGERS,
Clerk.

[Endorsed]: No. 346. United States Circuit Court of Appeals for the Ninth Circuit. Archie Shelp and George Cleveland, Plaintiffs in Error, v. The United States, Defendant in Error. Transcript of Record. In Error to the District Court of the United States for the District of Alaska.

Filed January 2, 1897.

F. D. MONCKTON,
Clerk.

No. 346.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ARCHIE SHELP and GEORGE CLEVELAND,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA.
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

LORENZO S. B. SAWYER,
Counsel for Plaintiffs in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

ARCHIE SHELP and GEORGE CLEVELAND, *Plaintiffs in Error.* vs. THE UNITED STATES OF AMERICA.	No. 346. 23 U. S. Stats. at Large Chap. 53, Sec. 14.

Statement of the Case

CHIEFLY IN THE WORDS OF THE RECORD.

At the adjourned November, 1894, term of the District Court for the District of Alaska the Grand Jurors for said district returned an indictment against the plaintiffs in error, defendants below, charging said defendants below, Archie Shelp and George Cleveland, with "the crime of unlawfully selling intoxicating liquors within said District, committed as follows: The said Archie Shelp and George Cleveland at or near Chilcoot, within the said District of Alaska, and within the jurisdiction of this Court, on or about the 18th day of August in the

year of our Lord one thousand eight hundred and ninety-four, did unlawfully and willfully sell to Alaska Indians, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor called whisky, to-wit, one pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors unknown; without having first complied with the law concerning the sale of intoxicating liquors in the District of Alaska.

"And so the Grand Jurors * * * upon their oaths do say: That Archie Shelp and George Cleveland did then and there unlawfully sell intoxicating liquors to-wit, whisky, in the manner and form aforesaid, to the said Alaska Indians contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America." (Record, pp. 2, 3.)

"And afterwards, to-wit, on the 2nd day of December, 1895, the following further proceedings were had and appear of record in said cause which are words and figures following, to-wit:

UNITED STATES, vs. GEORGE CLEVELAND and ARCHIE SHELP.	No. 427.

Plea.

"Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, and the defendant, George Cleveland being personally present and his counsel, John F. Malony, Esq., waives arraignment and further time to plead, and enters a plea of 'not guilty' to the indictment." (Record, p. 4.)

On April 15th, 1896, the following further proceedings were had and appear of record in said cause, to-wit:

Trial.

"This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally in court, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the venire of the petit jury was called" * * and a jury of twelve men "sworn to try the issues," and the evidence was heard in part. (Record, p. 5.)

"On the next day, April 16, 1896, the plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, the defendants being present and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the jury rendered the following verdict:

The United States of America,
District of Alaska.

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA,
vs.
ARCHIE SHELP and GEORGE CLEVELAND.

Verdict.

Special session commencing March 30, 1896.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment.

J. D. DOUGLAS,
Foreman."

The jury was thereupon discharged from further attendance in this cause and the defendants required to furnish bail in the sum of five hundred dollars for appearance before the Court for sentence. (Record, pp. 5–7.)

"And on April 18, 1896, the following further proceedings were had and appear of record in said case, to-wit:

"UNITED STATES,
vs.
ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Judgment.

"Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, as also come the defendants in person, with Messrs. J. F. Malony and John Trumbull, their counsel, and appearing for judgment, and the motion for new trial and the motion for arrest of judgment being denied—

"It is ordered, adjudged and decreed that defendants be, and they are hereby, convicted of the crime of unlawfully selling intoxicating liquors in Alaska and sentenced to imprisonment in the U. S. Jail for the District of Alaska for the term of six calendar months." (Record, pp. 20, 21.)

We have been thus full and precise in our recital of court proceedings for reasons that will soon appear.

Assignment of Errors.

"First: It was error for the Court to overrule the objections of the defendants to the witnesses Dennis, Goonawk, Dick, Samdoo, Casto and Jim, for the reason that the names of said witnesses were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of said witnesses, and for the further reason that no order of Court was made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment.

"Second: It was error for the Court after the plaintiff had rested its case to deny the defendants' motion for a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground that the plaintiff had failed to establish the material allegations of the indictment by evidence, in this, that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regard to the sale of intoxicating liquors in Alaska.

"Third: The Court erred in overruling the defendants' motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States.

"Fourth: The Court erred in instructing the jury in the manner and under the circumstances as follows, to-wit:

"One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

" 'That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury,—that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury.'

" After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

" 'It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian

village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native.'

"Fifth: The Court erred in denying the defendants' motion to vacate the verdict and to grant a new trial, in this, to-wit:

1. Irregularity in the proceedings and abuse of discretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered 'yes, sir,' whereupon the Court in presence of the jury exclaimed, 'A-h-h. That is all, sir.'

"2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: 'That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that 'The defendants went to the Indian village at Hoona and sold whisky there,' although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there.

"3. Surprise which ordinary prudence could not have guarded against.

"4. Newly discovered evidence, material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

"5. Insufficiency of the evidence to justify the verdict, in this to-wit, that it appears from the evidence that the defendants were at Funter Bay on the 16th and 17th days of August, 1894, eighty or ninety miles from Chilkoot; that they left on the 17th on their sloop, and arrived at Bartlett Bay on the morning of the 18th; that Bartlett Bay is about forty miles from Funter Bay; that they stayed at Bartlett Bay until the morning of the 19th; that Bartlett Bay is 108 miles from Chilkoot; that the trip from there to Chilkoot could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot at any time from the 16th to the 22nd of August. It further appearing from the evidence of the ex-Deputy Marshal, who went to Chilkoot two days after the alleged whisky selling took place, that the Indians arrived at Juneau on the 20th day of August, 1894, and made the complaint charging the defendants with selling liquor on the 18th day of August, and that the trip from Chilkoot to Juneau could not be made in less than two days.

"6. Error in law occurring at the trial and excepted to by the defendants."

Argument.

Before taking up and discussing seriatim the errors assigned herein, we wish to call the attention of the

Court to one plain, open, palpable and fatal error that appears upon the very face of the record.

The Court, can, in any case, and will, in a criminal case, notice a plain error not assigned. The Supreme Court often does this—did it in the Crain case *infra*—and so does this Court. A criminal proceeding is *strictissimi juris*. Everything against the accused is construed strictly, everything in his favor liberally. Where the error does not appear of record, of course, a bill of exceptions becomes necessary. This Court held in *Ry. Co.* vs. *Drake, et al* (72 Fed., 945), that a writ of error addresses itself to the record, and, therefore, when the record itself discloses the ground on which a reversal is sought there is no necessity for a bill of exceptions; and, again, that a statement on motion for a new trial, if regularly settled and allowed by the trial judge, may serve as a bill of exceptions on writ of error (Alexander vs. U. S. 57 Fed., 828). When the error appears of record, or, for that purpose, is incorporated in a bill of exceptions, it can be specified in a brief although not assigned.

The record in this case does not show that Archie Shelp, one of the defendants in the court below, was ever formally arraigned, or that he pleaded to the indictment, or that any plea was ever entered for him; unless all this is to be inferred simply from his presence at the trial, at the rendering of the verdict and at the pronouncing of the judgment and from the recital in the order of the trial that "the jurors were sworn to try the issues," and in the bill of exceptions that "the issue

joined in the above stated cause between the said parties came on to be tried before the said judge and a jury which was duly impaneled and sworn to try the issue between the said parties" (Record, pp. 4, 5, 6, 7, 20 and 21 and Statement of Case in brief). This the Supreme Court holds is not enough. The case of *Crain* vs. *The United States* (162 U. S., 625) involved the indictment and conviction of a more serious offense than these defendants are charged with, but the decision of the Court covers the whole ground. In the case at bar a plea is entered for *only one defendant and the verdict strictly follows and corroborates the plea of only one defendant.*

The decision begins:

"The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case." It then disposes of several of the grounds of the motion in arrest of judgment made in the court below, and then takes up this objection—the absence in the record of any definite statement of arraignment or plea of the defendant; and after citing many authorities and cases of misdemeanors, as well as higher crimes, it holds that an arraignment, and especially a *plea* "is not a matter of *form* but of *substance*," and "consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes (sometimes called the statute of amendments and jeofailes), but involves the substantial rights of the accused." "A plea to the indictment is necessary before the trial can be properly commenced, and unless this fact *appears affirmatively*

from the record, the judgment cannot be sustained. Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred. * * *" A little further on the court indignantly asks: "Are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea?" * * * "Nor ought the courts, in their abhorence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving the life or liberty of the accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should *appear affirmatively from the record* that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. *That will not suffice.* * * * The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction * * *where the record does not clearly show that there was a valid trial.* The judgment is reversed. * *"

Now as to our assignments of error. Passing over without waiving the first two, we come to the third:

"Third: The Court erred in overruling the defendants' motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States."

The ground of a motion in arrest of judgment, like any question that arises upon the pleadings, or upon the face of the record, is reviewable in an appellate court, like an objection to the jurisdiction of the court which may be taken at any time and is never waived.

Does this indictment charge facts sufficient to constitute a crime against the laws of the United States?

The statute under which this indictment was framed provides: "And the importation, manufacture and sale of intoxicating liquors in said district, except for medicinal, mechanical and scientific purposes, is hereby prohibited. * * * And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section" (23 Stats. at Large, 28). The allegation in the indictment, stripped of considerable verbiage, is that the defendants sold to Alaska Indians an intoxicating liquor called whisky without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska.

It will be seen at a glance, from a comparison of the law with the indictment, that all the allegations of the indictment might be true, and yet the defendants be innocent of any crime against the laws of the United

States. Even if the defendants, or either of them, sold any intoxicating liquor, *non constat* that they did not sell it for medicinal, mechanical or scientific purposes. When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to negative the exceptions, although if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment and the defendant must show that his case comes within them in order to avail himself of their benefit. Bish. Crim. Proc. § 635; Whart. Crim. Pl. §§ 240, 631.

We are aware that Judges Deady and Dawson sustained an indictment which did not negative these exceptions (U. S. vs. Nelson, 29 Fed. 202, 30, Fed. 112), but we think this court will prefer to follow the Supreme Court (U. S. vs. Cook 17 Wall. 173), in not departing from established forms. Via antiqua via est tuta. In the Crain case, supra, says the Supreme Court with reference to arraignment and plea, but it applies as well to this question, "Neither sound reason nor public policy justifies any departure from settled forms applicable in criminal prosecutions. * * Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty."

While upon the indictment, we call the attention of the court to the phrase, "Without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska."

Now the law supra absolutely prohibits such sale,

"except for medicinal, mechanical and scientific purposes." What, then, can be the meaning or relevancy of this phrase? It can only refer to the fact referred to in another case (U. S. vs. Ash 75, Fed. 651), that under the Internal Revenue laws, or under the regulations of the President by the Secretary of the Treasury, this great Government accepts from applicants in the district of Alaska an internal revenue tax and issues a license to sell intoxicating liquors contrary to law, and then indicts, arrests and punishes them for doing so. This clause may not invalidate the indictment, because, like the words, "Alaska Indians," it may be regarded as surplusage; but the "state of things" which it points at certainly reflects no credit upon our beneficent Government and its laws and the administration of justice in Alaska.

Our next error alleged is to a portion of the charge of the court given in the manner and under the circumstances following, to-wit:

"Fourth: * * One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

'That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury,—that the evidence of such wit-

nesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury.'

After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

"'It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a

view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native." What a wholesale denunciation of both the good & the bad in order to bolster up the bad!

In *Hicks* vs. *U. S.* (150 U. S., 442), the Supreme Court held that "The rule that exceptions should be precise and pointed, so as not to require the Court to search for errors through long passages, does not apply when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of." Is not the unfairness of this instruction apparent? Civilization and even Christianity go for naught with this judge in his most-seeming righteous wrath. Falstaff, to cover up his own monstrous lies, exclaimed, "Lord, lord, how this world is given to lying!" But this able and learned judge, in cold blood and without any inducement, makes the same exclamatory declamation. David, in his sore affliction, made a similar complaint, but took it back and apologized for it in almost the same breath, "I *said in my haste*, all men are liars." How different from this instruction those which the Supreme Court in recent cases approves—how much more objectionable than some of those which it condemns.

In *Hicks* vs *U. S.* (150, U. S., 442), the accused having testified in his own behalf, the Court charged that there was or might be a "conflict as to the material facts between the statements of the accused and the statements of the other witnesses who are telling the truth." The Supreme Court held that this was objectionable in its assumption that the witnesses who contradicted de-

fendant were telling the truth. And "when the statute makes the accused, on his own request, a competent witness, its policy should not be defeated by hostile comments of the trial judge."

In *Starr* vs. *U. S.* (153 U. S., 626), the Supreme Court quote with approval the language of the Supreme Court of Pennsylvania in *Burke* vs. *Maxwell*, 81 Pa. St., 139: "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead and especially that it should not be one-sided."

In this same Starr case says the Court:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling (referring to the Hicks case *supra*). The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independant judgment in the circumstances, or with the circumspection and caution which should characterize judicial utterances."

In *Hickory* vs. *U. S.* (160 U. S., 408), the Court below

contrasted the testimony of the accused with circumstances to the prejudice of the former. The Supreme Court, after quoting the Starr and other cases, says:

"Such denunciation of the testimony of the accused is without legal warrant citing *Allison* vs. *U. S.* (160 U. S., 203). This instruction was if possible more markedly wrong from the implications which it conveyed to the jury. * * * In *Reynolds* vs. *U. S.* (98 U. S., 168), speaking through Mr. Chief Justice Waite, this Court said on the same subject, 'Every appeal by the Court to the passions or prejudices of the jury should be promptly rebuked and * * it is the imperative duty of the reviewing Court to take care that wrong is not done in this way'"

In the Allison case referred to says the Supreme Court: "Where the charge of the trial judge takes the form of animated argument, the liability" * * of error "is great."

In *Brown* vs. *U. S.* (17 S. C. Rep., 33, not yet officially reported), the Supreme Court reversed a judgment for the third time, after three juries (36 jurors) had agreed to find the defendant guilty, because the trial judge charged that 'twas not the judgment of bad people, the criminal element, the man of crime * * that made up reputation. * * To the same effect is *Smith* vs. *U. S.* (161 U. S., 85).

Against such a charge as that in this case of what avail would be even the armor of innocence? What becomes of those good old English maxims that the Court is always the chief counsel for the prisoner, and

that it is better that nine guilty men escape than that one innocent man be punished? Such is the wisdom and humanity of our laws that in the United States courts *only* the defendant has a right to a review in a criminal case.

Does not this whole charge illustrate how out of place in a Judge's charge is wit or even humor? Wit is often cruel, humor grim, and both unjust.

Our next assignment of error, our fifth assignment, is to the ruling of the court below upon a motion for a new trial setting forth the grounds of the motion.

It has been repeatedly held that a motion for a new trial or any other motion addressed solely to the discretion of the court below is not reviewable. The exception to this rule, and there are very few rules which are not proved, as they say, by exceptions, is that "where the questions presented (grounds of the motion) go directly to the merits of the case," the appellate court will review them. *U. S.* vs. *Hewecker* 17 S. C. Rep. 18 not yet officially reported). In *Ball* vs. *U. S*, (163 U. S. 662, 674,) and in other cases, the Supreme Court does consider the grounds of a motion for a new trial. This exception covers our case.

An appellate court will review matters of mere discretion where the discretion has been abused and even matters of fact where the facts are all on one side and the judgment complained of on the other. What are courts for, if not to do justice and to see justice done?

The grounds of the motion for a new trial, which we claim are reviewable in this court, are:

"1. Irregularity in the proceedings and abuse of dis-

cretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered 'yes sir,' whereupon the Court in presence of the jury exclaimed, 'A-h-h. That is all, sir.'

"2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: 'That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that 'The defendants went to the Indian village at Hoona and sold whisky there,' although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there."

As we have said of other errors, the error here hardly needs pointing out. The Judge himself elicits from a witness a fact which he evidently thinks counts against the defendants that there was an Indian village at Bartlett Bay and another at Hoona, over which in the presence of the jury he gloats, implying that, in his opinion, the defendants sold liquor at both those places; although they were not charged with having done so, nor was there a *scintilla* of evidence to prove it.

Did not the Judge's (in the words of the Supreme

Court) "abhorrence of crime," and a desire to see *somebody* punished get the better of his sober judgment in this case?

It appears from the second ground of the motion that the United States Attorney as well as the Court traveled out of his way and out of the record to abuse these defendants.

In *Preston* vs. *Mut. Life Ins. Co.* of N. Y., (71 Fed. 467,) the court, and although it was a trial court, we submit that the rule announced applies to any court, says:

"It is a familiar rule that counsel must not in argument refer to matter not in evidence to the prejudice of the adverse party and the failure to observe this rule is just ground for a new trial. * * The duty of the court to see that a trial is fair and that all material questions are fairly presented, is imperative, and the duty to regulate the proper conduct of a trial may be discharged either with or without motion. A case of such palpable unfairness might be presented as to warrant the Court in interposing upon its own motion."

That this conduct of the United States Attorney was calculated to prejudice the jury against the defendants does not admit of doubt,—'tis too plain for argument. We cannot make it any plainer than the bare statement makes it. Besides, to get the judgment against us reversed, we do not have to show that anything *did* prejudice or mislead the jury—all that is required of us is to show that it *might have* done so.

The other grounds of this motion we pass over

rapidly. If the Court thinks they go to the merits of the case it will consider them.

It appears from the fifth ground and from a reference to the indictment and testimony, that it was a physical impossibility for the defendants to have committed the crime charged at the time and place charged and attempted to be proved.

If the jury did not give the defendants the benefit of any legal and reasonable doubt to which they were lawfully entitled, this Court will right this wrong. A high Court of justice never shows to such advantage as when it tempers justice with mercy, which it must do when it expounds our "wise and humane" criminal laws.

We respectfully submit that for the errors herein recited the judgment of the lower court as to both defendants should be reversed, and the said defendants ordered discharged.

Respectfully submitted,

LORENZO S. B. SAWYER,

Counsel for Plaintiffs in Error.

No. 346

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

In Error to the United States District Court for the District of Alaska.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARCHIE SHELP AND GEORGE CLEVELAND,
Plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA,
Defendants in error.

Brief of Defendant in Error.

STATEMENT OF THE CASE.

About the 18th day of August, 1894, the plaintiffs here arrived at Chilkoot, Alaska, in a small boat, having on board whisky for the purpose of selling to the Indians, or native Alaskans, who lived in that village. Chilkoot is an Indian village situated in Southeastern Alaska. They anchored their boat off shore, and the plaintiff Cleveland waved his hat and attracted the attention of one of the natives by the name of Dennis, and at the same time went to a small keg containing whisky, and drew a tin cup full from it and drank it, so that Dennis could see and know that they had whisky on board their boat. Being unable to resist the temptation to obtain whisky, as all Alaskan natives are addicted to its use

Dennis immediately went off to the boat. The plaintiffs immediately drew more whisky out of the keg and gave it to Dennis to drink, and told him to go and tell all the people in the village that they (the plaintiffs) had plenty of whisky on board their boat. This Dennis did, and the result was that twelve of the head men of that village went in their canoe from the village to the plaintiffs' boat, and purchased from them all the whisky that they could with their limited means. Dennis himself bought two bottles and paid two dollars a bottle.

Dennis testifies to the above state of facts, as does also Goonawk, Dick, Samdoo, Kassto, Dave and Jim, natives of this village, who purchased whisky of the defendants at this time.

POINTS OF LAW.

The crime of which these appellants are charged is a misdemeanor.

FIRST.

In regard to plaintiffs' first assignment of error, it is submitted that it was proper for the court to overrule their objection to testimony being given by the witnesses Goonawk, Dick, Samdoo, Kassto, and Dick, for the reason that it was not necessary that their names appear upon the indictment, as only those names appear upon the indictment who appeared before the grand jury.

See General Laws of Oregon, page 348, paragraph 61.

Nor was it necessary that plaintiffs or their attorneys be furnished with a list of the names of the wit-

nesses, as this is only necessary in treason and other capital offenses.

See Revised Statutes of the United States, sec. 1033.

Nor was it necessary for the Government to obtain an order of court allowing it to swear other witnesses than the names of those who appeared upon the indictment.

SECOND.

In regard to plaintiffs' second assignment of error it is submitted that it was proper for the court to deny their motion for nonsuit as the prohibitory liquor law of Alaska is specific, and absolutely prohibits the sale of intoxicating drinks in Alaska. Liquor can be sold of course under the Governor's permit, for mechanical, and scientific purposes, but this is an exception; and if a person sells liquor thus inhibited, he must show that he sells for said purposes and has a right to so sell.

THIRD.

In regard to plaintiffs' third assignment of error, it is submitted that it was proper for the court to overrule their motion in arrest of judgment, as the indictment charged facts sufficient to constitute the crime it purported to allege.

FOURTH.

In regard to plaintiffs' fourth assignment of error, it is submitted that there was no error committed in the court's instruction to the jury.

FIFTH.

In regard to plaintiffs' fifth assignment of error, it is submitted that it was proper for the court to deny their motion to set aside the verdict and grant a new trial, as there was no abuse of discretion on the part of the court; neither was there any misconduct on the part of the United States attorney in his argument to the jury; no objection or exception thereto having been made or taken at the time.

Bland v. Gaither (Ky.), 11 S. W. 423; 10 Ky. L. Rep. 1033.
State v. Taylor (Mo.), 11 S. W. 570.
State v. Carter (Mo.), 11 S. W. 624.
Gray v. Chicago M. & St. P. R. Co., 75 Iowa, 100; 39 N. W. 213.

As to the other reasons mentioned in said assignment of error it is not necessary to seriously consider them.

There is one other matter that I desire to call the court's attention to, although it is not in plaintiffs' assignment of errors. It will be noticed that the record discloses the fact that one of the plaintiffs was not arraigned and did not plead, but it will be observed further that the record discloses the fact that he was present at the trial and went to trial, and even went upon the witness stand in his own behalf. Therefore, it is contended, he is not entitled, under the federal statutes, to a new trial because of the failure of the record to show arraignment and plea, for the reason that the irregularity was "a de-

fect or imperfection in matter of form only," within the meaning of section 1025 U. S. Rev. Stats., and did not tend to his prejudice.

United States v. Molloy, 31 Federal Reporter, 19.

I therefore respectfully submit that the judgment of the United States District Court for the district of Alaska should be affirmed.

BURTON E. BENNETT,
United States Attorney.

No. 346

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Supplemental Brief of Defendant in Error.

In Error to the United States District Court for the District of Alaska.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error

Supplemental Brief of Defendant in Error.

Permission is respectfully asked of the Court to file a few observations, hastily reduced to the form of a brief, respecting this case, which do not appear to have been suggested in the brief heretofore filed by the U. S. Attorney for Alaska, and which are deemed pertinent here.

It is true that, as contended by the plaintiffs in error, a writ of error addresses itself to the record, and therefore when the record itself discloses the ground for reversal, a bill of exceptions is unnecessary. The case cited by plaintiffs, however, Rail-

way Co. *vs.* Drake, *et al.*, 72 F. R., 945, is itself based upon the decision in the case of Storm *et al.*, *vs.* U. S, 94 U. S. 76, which requires that objection should be regularly made, and due exception taken in the Court below to an alleged error, in order to bring the same before the Appellate Court. The authority cited by counsel does not dispense with such necessary prerequisites; it merely dispenses with a bill of exceptions in certain cases. In the case at bar there was no objection made, or exception taken by the plaintiff Shelp for the alleged failure of the Court to arraign him, or cause his plea to be entered. It is not even assigned as error; and it is therefore respectfully submitted that it cannot now be brought to the attention of this Court.

Moreover, there is no statement in the record that the plaintiff Shelp was not arraigned and his plea not entered. *Non constat*, but, that from all the record says, the plaintiff Shelp, was arraigned and pleaded not guilty. It is stated in the bill of exceptions (p. 22), that "*the issue* "*joined in the above stated cause between the said parties* "(referring to both plaintiffs here) came on to be tried "* * * the defendants (were represented) by cer- "tain counsel." How could issue have been joined between the Government and Shelp without a plea from the latter? Both of the defendants are tried, plaintiff Shelp, among others, taking the witness stand in his defense. Not one word of protest then came from him that his trial was irregular or void in the respect indicated. It is not alleged as one of the grounds of a motion for a new trial, or in arrest of

judgment, or as an assignment of error. Can it be possible that he can now be heard to protest for the first time that he was not arraigned? He voluntarily submitted himself to the Court's jurisdiction, and had the advantage of a trial in the manner provided by law.

U. S. R. S., Sec. 1032, provides that "when the "party pleads not guilty, or such plea is entered as "aforesaid" (*i. e.*, where he stands mute upon his arraignment), "the cause *shall be deemed at issue*, and "shall, without further form or ceremony, be tried by "jury." As before observed, the record discloses, at least inferentially, that issue was joined between the parties. The Court will presume that the proceedings in the Court below were regular unless the contrary clearly appears. The contrary does not clearly appear. It will therefore presume, we submit, in a case not involving an infamous punishment, that the issue was legally joined, *i. e.*, by plea of not guilty from the plaintiff Shelp; and the Court will not permit the record to be contradicted by an inference that there was no such plea entered by Shelp, because it is not specifically set forth in the printed transcript. Suppose, however, the plaintiff Shelp, was not arraigned. The failure to do so on the part of the Government would, it is respectfully submitted, be cured by Section 1025, U. S. R. S. The case quoted upon this point by plaintiffs' counsel, Crain *vs.* U. S., 162 U. S., 625, is not here applicable. That case involved an infamous offense, and the Court was particularly careful to limit its inquiry to cases of that

nature in discussing the absence of any arraignment. The case at bar does not involve an infamous offense; but concerns an offense of the class commonly designated misdemeanors, punishable by a maximum imprisonment of six months,

23 U. S., Stats. at Large, at page 28.
U. S. R. S., Section 1955;

and many formalities deemed vital in the prosecution of the former class of crimes can be waived by the defendant in the trial Court in a prosecution for the commission of the latter class of offenses. The plaintiff in error, Cleveland, formally waived arraignment (Trans., p. 4) though it seems his plea was entered; and no objection has been made by counsel to this waiver, nor has the suggestion been made that the trial was irregular or void as to him. Why can an objection be now successfully raised that the other plaintiff in error, Shelp, was not legally tried, because he saw fit to remain mute, and, by his submission to trial without protest, virtually waive arraignment also? Three justices dissented from the opinion of the majority of the Court in the case just referred to; and had the grade of the offense involved in that case been lower than infamous, as in the present case, it is fair to presume that the Supreme Court would have held that the failure of the plaintiff in error, Shelp, to more seasonably object to the defect, if found to exist, and his acquiescence and participation in his subsequent trial constituted a waiver of arraignment, of which he could now take

no advantage on appeal, and which was cured by Section 1025, *supra*.

The plaintiff's first assignment of error does not, we submit, merit attention.

General Laws of Oregon, page 348, paragraph 61.

U. S. R. S , Section 1033.

We note the plaintiff's counsel treats it, as well as the second assignment, with equal insignificance.

We pass from the second assignment, as equally undeserving of comment, to the third. The objection to the sufficiency of the indictment to charge the commission by the plaintiffs in error of a crime against the United States, was raised for the first time by motion in arrest of judgment. It will be noted that under Section 1025, *supra*, "any defect or imperfec- "tion in matter of form only, which shall not tend to "the prejudice of the defendant," does not affect the trial or judgment of such defendant.

Wharton's Criminal pleading and practice, Section 760, states that "errors as to form, not going to the "description of the offense, which might have been "taken advantage of at a previous stage, are not suffi- "cient to cause arrest (of) judgment;" and the section closes with a quotation from an English decision of Blackburn, J., in 1873: "Where an averment which "is necessary to support a particular part of the "pleading has been imperfectly stated, and a verdict "on an issue involving that averment is found, and "it appears to the Court, after verdict, that unless

" this averment were true the verdict could not be " sustained, in such case the verdict cures the defec- " tive averment, which might have been bad on de- " murrer."

Let us concede, for the moment, that the indictment is defective in not specifically alleging that the plaintiffs in error were not within the exception mentioned in the Act,

23 Stats., at Lat. p. 28,
U. S. R. S., Sec. 1955,

instead of averring that plaintiffs in error " unlawfully and wilfully" sold the liquor, " without having first " complied with the law concerning the sale of intoxi- " cating liquors in the District of Alaska." The indictment was not attacked by demurrer or motion to quash; the plaintiffs were tried thereon, and convicted. The jury must have found that the alleged defective averments, hereinabove quoted, were true, in order to reach a verdict of guilty, and the verdict could not be sustained unless these averments were found to be true.

It thus becomes apparent that the alleged defect has been cured by the verdict.

But is the indictment defective in this particular? We submit it is not. A former indictment, framed under the law in question, averring that the defendant sold certain liquors in Alaska, contrary to the Statutes of the United States, without negativing

the exception contained in the Act, was construed by Judge Dawson in

U. S. *vs.* Nelson, 29 F. R., 202,

and by Judge Deady, on writ of error, in

U. S. *vs.* Nelson, 30 F. R., 112,

and such indictment was held good. The objection thereto was taken more strongly there than here, because it was raised before trial by demurrer; and the law applicable to exceptions contained in Acts denouncing offenses is there discussed *in extenso.* These cases are referred to with approval in later Federal decisions. The indictment in the case at bar was probably framed with these decisions before the pleader; and we unite with counsel for plaintiffs in error in recalling to the Court's attention the adage "*via antiqua via est tuta,*" and agree with him in his quotation (p. 13) that "neither sound reason nor pub-" lic policy justifies any departure from settled forms applicable in criminal prosecutions." See further

U. S. *vs.* Cook, 36 F. R., 896.

In the fourth assignment, the plaintiffs in error complain of a portion of the Court's charge to the jury, to which an exception of a general character was taken, not pointing out specifically the matter objected to (Transcript, p. 31). We shall presume that it was taken before the jury retired. It will be noticed by the Court that this portion of the charge contained more than one distinct proposition. It related to (first) the relative credibility of Indians and white men; (second) the probability or lack of proba-

bility that plaintiffs in error committed the offense charged, as indicated by the character of the country, the habits and dispositions of the Indians who lived there, and the quantity of whisky-peddlers in that neighborhood; and (third) the lack of evidence that plaintiffs in error were prospecting or locating claims.

The Court is familiar with the rule of law, that *a general exception to a charge of the Court to the jury, or to any part thereof, will not avail a plaintiff in error where the charge contains distinct propositions, and any one of them is free from objections.*

Anthony *vs.* Louisville & Nashville R. R. Co., 132 U. S., 172.

Foster's Federal Practice, Vol. 2, p. 786.

The objection itself to the charge shows that the plaintiffs' counsel on the trial were endeavoring to embrace more than one proposition in such objection. It was objected (Transcript, p. 31) that "the same "(the charge) is not law, is misleading, tending to "confuse the jury and distract their attention from "the evidence." That portion of the charge relating to the first of the above propositions certainly did not bring forth the objection that it tended "to con-"fuse the jury and distract their attention from the "evidence." The counsel must have framed their objection to meet the second, or possibly the third, proposition *supra*, advanced by the Court, while apparently objecting to the first part of the charge that it was not law.

It certainly requires no argument from us to de-

monstrate that the first part of the charge, without commenting upon the rest of it, is not open to the objection referred to in the cases mentioned in the brief of plaintiff's counsel.

We respectfully submit that this Court cannot inquire into the alleged errors constituting the plaintiff's fifth assignment. *A motion for a new trial is addressed to the trial Court's discretion, and cannot be assigned for error.*

Pittsburg, etc., Ry. Co. *vs.* Heck, 102 U. S., 120.
Wharton's Criminal Pleading and Practice, Secs. 897, 902.

Referring specifically, however, to the various grounds of the motion, it will be observed that no objections were made or exceptions taken by counsel for plaintiffs in error upon the trial, at the time the Court questioned the witness Raymond, or at the time of the alleged misconduct of the United States Attorney for Alaska, or at any other time, respecting these assigned errors, nor does the record show any waiver of such objections or exceptions.

The record must show that the exception was taken at that stage of the trial when its cause arose, i. e., when the ruling or instruction objected to, was given, or it will not be considered by the Appellate Court. That Court is confined to exceptions actually taken at the trial.

Hanna *et al. vs.* Maas, 122 U. S., 24.
Brown *vs.* Clarke, 4 How., 4.
Turner *vs.* Yates, 16 *Id.*, 14.
Barton *vs.* Forsyth, 20 *Id.*, 532.

U. S. *vs.* Breitting, 20 *Id.*, 252.
Phelps *vs.* Meyer, 15 *Id.*, 160.
Hunnicutt *vs.* Peyton, 102 U. S., 333, 354.

The rule in civil and criminal cases is the same.

In the case of Chandler *vs.* Thompson, 30 F. R., 38, 45, it is held that, following the general rule, *any exceptions to the remarks of counsel to the jury should be taken when such remarks were made.* The reason for the rule is too obvious to call for comment.

It is therefore submitted that such charge or remarks cannot be reviewed upon appeal.

In the case of Ball *vs.* U. S., No. 17, Advance Sheets U. S. Sup'm Ct. Opinions, cited by plaintiffs' counsel, a motion for a new trial was referred to by the Court, but it was found to have been based upon an alleged defect in the case not objected to upon the trial, and was therefore dismissed. In the case of U. S. *vs.* Hewecker, 163 U. S., 24, also referred to in counsel's brief, the Court states, in speaking of the repeal of Sections 651 and 697, U. S. R. S., by the Circuit Court of Appeals Act of 1891,

"The general rule was that this Court could not, "upon a certificate of division of opinion, acquire "jurisdiction of questions relating to matters of pure "discretion in the Circuit Court, and therefore that a "certificate on a motion for a new trial would not lie, "but where the questions presented went directly to "the merits of the case it had been held that jurisdic- "tion might be entertained.

U. S. *vs.* Rosenberg, 74 U. S., 7 Wall., 580."

The evidence taken upon the trial on behalf of the prosecution disposes, it seems to us, of the fifth ground of the motion, and we find nothing contained in the sixth ground not heretofore referred to.

No exception appears to have been taken at the time the Court denied the motion of plaintiffs in error for a new trial, nor even at any time afterwards. Nor was such exception waived; but the record is particular to state that exception was taken to the overruling of the motion in arrest of judgment.

It is therefore respectfully submitted that the judgment of the U. S. District Court for the District of Alaska should be affirmed, with costs.

SAMUEL KNIGHT,

Assistant U. S. Attorney, for the Northern District of California, of Counsel.

No. 348.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY,

Appellant,

vs.

JOHN D. WILCOX.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the District of Oregon.

INDEX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
E. I. MESSINGER,
Defendant.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Stipulation as to Printing of Record.

The bills, answers, decrees, assignments of errors and all the other papers and proceedings in the above-enti-

tled causes being exactly alike, with the exception that in the case of the Eastern Oregon Land Co. vs. E. I. Messinger it is alleged that the land patented to the defendant was patented under the provisions of the Act of Congress approved May 20th, 1862, entitled "An Act to secure homesteads to actual settlers on the Public Domain," and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south of range sixteen east of the Willamette Meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road, as designated on the map of August 17th, 1870, and that the said patent was dated the 17th day of August, 1894, while in the case of the Eastern Oregon Land Co. vs. John D. Wilcox it is alleged that the land patented to him was patented under the provisions of the act of Congress approved April 24th, 1820, entitled "An Act making further provisions for the sale of public lands," and the acts supplemental thereto; that the lands patented were the northeast quarter and the southeast quarter of section fifteen, township five, south of range seventeen east of the Willamette Meridian, in Oregon, and were situated more than twenty miles and less than forty miles from the line of the general route of the Northern Pacific Railroad Company's road, and that said patent was dated the 28th day of December, 1894.

It is stipulated by the parties to the above-entitled suits, by their respective attorneys, that unless the above-

entitled court shall otherwise order, only the record in the above-entitled suit of the Eastern Oregon Land Co. vs. John D. Wilcox shall be printed, and that the appeal in the case of the Eastern Oregon Land Co. vs. E. I. Messinger may be heard and submitted in said court without printing the record thereof.

DOLPH, NIXON & DOLPH,
Solicitors for Complainants and Appellants.

JNO. M. GEARIN, and
J. L. STORY,
Solicitors for Defendants and Respondents.

[Endorsed]: Filed Jan. 9, 1897. F. D. Monckton, Clerk.

Citation.

United States of America, } ss.
District of Oregon. }

To John D. Wilcox, Esq., Greeting:

Whereas the Eastern Oregon Land Company has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law,

you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this Jan. 5, 1897.

WM. B. GILBERT,
Judge.

United States of America,
District of Oregon. } ss.

Due and legal service of the within citation is hereby admitted at Portland, in said District, this 5th day of January, A. D. 1897.

JNO. M. GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed January 5, 1897. J. A. Sladen, Clerk. By G. H. Marsh, Deputy Clerk.

In the Circuit Court of the United States for the District of Oregon.

April Term, 1896.

Be it remembered, that on the 8th day of July, 1896, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, Sitting in Equity:

The Eastern Oregon Land Company brings this, its bill of complaint, against the above named defendant, and complaining says:

I.

That the complainant, the Eastern Oregon Land Company, is and was during all the times hereinafter mentioned, a corporation duly incorporated under the laws of the State of California, and was and is a citizen of said State, and that the defendant above named is a citizen and resident of the State of Oregon.

II.

Your orator further shows to your Honors that during all the times hereinafter mentioned the Dalles Military Road Company was and now is a corporation duly incorporated and organized under and by virtue of the general laws of the State of Oregon.

III.

Your orator further shows to your Honors that on the 25th day of February, 1867, the Congress of the United States passed and the President of the United States duly approved an act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, Mormon or Humbold Basin, to a point on Snake River opposite Fort Boise in Idaho Territory, the alternate sections of public lands designated by odd sections to the extent of three miles in width on each side

of said road; that said act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose and that they should be disposed of only as the work progressed and that lands lying within the limit fixed by said act and theretofore reserved or appropriated should be reserved from the operation of said act except so far as it was necessary to locate the road over the same, in which case the right of way to the width of 100 feet was granted; that said act further provided that the grant should not embrace mineral lands of the United States and that the lands thereby granted to the State of Oregon should be disposed of by the Legislative Assembly thereof for the purposes aforesaid and no other, and that the said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any of the property, troops, or mails of the United States; that said act also authorized the State of Oregon to locate and use in the construction of said road an additional amount of the public lands not previously reserved to the United States or otherwise disposed of and not exceeding ten miles in distance from the general route of the road and equal to the amount reserved within the limits of the grant in place from the operation of the act, said lieu lands to be selected in alternate sections as provided therein; that said act further provided that the lands thereby granted to the State of Oregon should be disposed of only in the following manner, that is to say, when the Governor of the State should

certify to the Secretary of the Interior that ten co-terminous miles of said road were completed then a quantity of the land granted by the act not exceeding thirty sections might be sold and so on from time to time until said road should be completed and that if the road was not completed within five years no further sales should be made and the lands remaining unsold should revert to the United States, and also the Surveyor-General of the District of Oregon should cause the lands granted by the act to be surveyed at the earliest practical period after the said State should have enacted the necessary legislation to carry the said act of Congress into effect.

IV.

And your orator further shows unto your Honors that on the 20th day of October, 1868, the Legislative Assembly of the State of Oregon passed and the Governor approved an act entitled "An act dedicating certain lands to Dalles Military Road Company," which act after setting forth the act of Congress aforesaid granted to the Dalles Military Road Co. all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon by the said act of Congress for the purposes of aiding said Dalles Military Road Company in constructing the road mentioned and described in said act of Congress aforesaid and upon the conditions and immunities therein prescribed; and further that the said Legislative Assembly granted and pledged to the said

Dalles Military Road Co. all moneys, lands, rights, privileges, and immunities which might thereafter be granted to the State of Oregon to aid in the construction of said road for the purposes and upon the conditions mentioned in said act of Congress or which might be mentioned in any further grant of money or land to aid in the construction of such road, and the said act of the Legislative Assembly of the State of Oregon authorized the said Dalles Military Road Co. to locate, subject to the approval of the Governor of the State of Oregon, all lands within the ten mile limit prescribed by said act of Congress aforesaid in lieu of land reserved to or disposed of by the United States and lying and being within the limits of the grant as described in the First Section of the Act of Congress aforesaid.

V.

And your orator further shows unto your Honors that the said Dalles Military Road Co. is a private corporation and was duly incorporated and organized on the 30th day of March, 1868, under and by virtue of the general laws of the State of Oregon providing for private corporations and the appropriation of private property therefor, and that the enterprise and business in which the said corporation proposed to engage was the location and construction of a clay road from the city of The Dalles, in the County of Wasco, Oregon, by way of Camp Watson and Canyon City to a point on Snake River opposite Fort

Boise in the Territory of Idaho about two miles below the mouth of Owyhee River; that James K. Kelly, N. H. Gates, and Orlando Humason were the incorporators thereof; that on the 11th day of January, 1871, the Dalles Military Road Co., by Orlando Humason, Victor Trevett, O. S. Savage, O. W. Weaver, and B. W. Mitchell, the then directors thereof, in pursuance of the unanimous vote of the stockholders thereof, duly made and filed supplemental articles of incorporation, and that said supplemental articles of incorporation contained but one article, which is as follows, to-wit: "The enterprise and business in which the said corporation proposes to engage, in addition to the location and construction of a clay road as provided in the original articles of incorporation, is to accept and receive any and all grants of lands and other things of value from the United States and the State of Oregon and to sell and convey and to purchase and to hold land and other property which the said directors of said corporation may deem necessary and convenient for the interests thereof, and to engage in any business incidental to and connected with receiving any such grant and in selling, conveying, purchasing, and holding any land or property that may come into the possession of said company, also to establish and keep a toll road on any part of the road belonging to said company."

VI.

And your orator further represents and shows unto

your Honors that prior to the 23rd day of June, 1869, the said Dalles Military Road Co. duly surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of Congress and in the said act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road and had filed in the executive office of the Governor of the State of Oregon a plat or map of the said Dalles Military Road, upon which was traced and shown the definite location of said wagon road, from its terminus at the city of The Dalles, Oregon, to its terminus on Snake River, and the limits of the grant of land in place made to the State of Oregon by the said act of Congress to aid in the construction of said road, and also the indemnity limits of said grant, and that on June 23rd, 1869, the Governor of Oregon certified that the plat or map of said Dalles Military Road Co. had been duly filed in the executive office, that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the act of the Legislative Assembly of the State of Oregon approved October 20th, 1868, entitled, "An act donating certain lands to the Dalles Military Road Co.," and the said Governor of Oregon at that date further certified that he

had made a careful examination of said road since its completion and that the same was built in all respects as required by the said above recited acts and was then accepted, as will more fully appear by said certificate, of which the following is a copy:

Executive Office, Salem, Oregon,
June 23rd, 1869.

I, George L. Woods, Governor of the State of Oregon, do hereby certify that this plat or map of the Dalles Military Road has been duly filed in my office by the Dalles Military Road Co., and shows, in connection with the public surveys as far as the said public surveys are completed, the location of the line of route as actually surveyed and upon which their road is constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled, "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled, "An act donating certain lands to Dalles Military Road Company." And I further certify that I have made a careful examination of said road since its completion and that the same is built in all respects as required by the said above recited acts, and that said road is accepted.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23rd, 1869.

GEORGE L. WOODS. [Seal]

Attest: Samuel E. May.

VII.

And your orator further shows unto your Honors that upon the filing of the said plat or map in the executive office of the Governor of the State of Oregon showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the Governor of Oregon certifying to the completion of said road, the grant made by the said Act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said road became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road as located and constructed.

VIII.

And your orator further shows unto your Honors that the said Dalles Military Road Co. duly filed in the office of the Secretary of the Interior of the United States a map or plat of the said Dalles Military Road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the

said Governor of the State of Oregon certifying to the construction of said road, and that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States and was accepted and received and filed in said department; and that on December 18th, 1869, the Commissioner of the General Land office of the United States, by order of the Secretary of the Interior, withdrew from sale the odd numbered sections within three miles from each side of said wagon road, as delineated and shown on said maps, in favor of the Dalles Military Road Company.

IX.

And your orator further shows unto your Honors that the Congress of the United States, by an act approved June 19th, 1874, entitled "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon to aid in the construction of certain wagon roads and the certificate of the Governor of Oregon should show that any such road had been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands, unless the State should by public act have transferred its interests in such lands to any corporation, in which case the said lands were to be patented to such corporation.

X.

And your orator further shows unto your Honors that Edward Martin, then a resident of San Francisco, in the State of California, placing confidence in the truth of the certificate of the Governor of the State of Oregon, dated June 23rd, 1869, that said road had been duly constructed in accordance with the requirements of said act of Congress approved February 25th, 1867, and also placing confidence in the order of the Commissioner of the General Land Office, dated December 18th, 1869, withdrawing said lands within the limits of the said grant in the State of Oregon in favor of the Dalles Military Road Company, from sale, and also believing that the said act of Congress, approved June 18th, 1874, would be carried into effect by the issuance of patents to the said Dalles Military Road Company for said lands, and without any notice or knowledge, actual or constructive, that any portion of said grant was claimed by the Northern Pacific Railroad Company or any other corporation or person, or that any portion of the lands within the limit of the grant in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a grant to the Northern Pacific Railroad Company or to any company or person or for any other reason, did on the 31st day of May, 1876, purchase in good faith, for a valuable consideration, to-wit, the sum of $125,000.00, then paid by said Edward Martin to said Dalles Military Road Company, all the lands em-

braced in the grant to said company, except such portions thereof as had been previously sold by it; that previous to the time of paying said sum of $125,000.00 purchase money and receiving said deed, said Edward Martin had no notice or knowledge, actual or constructive, of any claim by the said Northern Pacific Railroad Company or by any corporation or person or by the Government of the United States that any portion of the lands granted to the State of Oregon to aid in the construction of said wagon road were excepted or claimed to be excepted from said grant on account of any previous grant to the Northern Pacific Railroad Company or any corporation or person or for any reason whatever; that thereupon the said Edward Martin became and was a bona fide purchaser for a valuable consideration of all said lands then owned by the said Dalles Military Road Company, which were then conveyed to him by the said corporation, as will more fully appear by said deed, of which a copy is attached to this bill of complaint and marked Exhibit "A."

XI.

That said Edward Martin afterwards, to-wit, on January 31st, 1877, executed and delivered to D. V. B. Henarie, a deed of trust, whereby he acknowledged that said D. V. B. Henarie was the owner of the undivided one-fourth of all the lands mentioned and described in the said deed of the Dalles Military Road Co. executed to the said Edward Martin and that he held the same in trust for the

said Henarie, which deed of trust was recorded in Wasco County, Oregon, on May 7th, 1884, in Volume A, page 265, of Miscellaneous Records, also in Baker County, Oregon, on May 10th, 1884, in Volume 2, page 317, of Record of Leases and Agreements, also in Grant County, Oregon, on May 27th, 1884, in Volume A, page 584, of Miscellaneous Records.

XII.

And your orator further shows unto your Honors that when said Edward Martin purchased said lands on May 21st, 1874, as hereinbefore stated, said D. V. B. Henarie paid one-fourth of the consideration of the same, to-wit, one-fourth of $125,000.00; that he, the said D. V. B. Henarie made said purchase in good faith, relying upon the certificate of the Governor of the State of Oregon that said road had been constructed according to the act of Congress approved February 25th, 1867, and also relying upon the act of Congress approved June 18th, 1874, that patents in due form of law would be issued to the Dalles Military Road Company for said lands; that he had no notice or knowledge, actual or constructive, at the time he paid one-fourth of the said purchase money and when said deed was executed and delivered to said Edward Martin that any portion of the land so granted to the State of Oregon to aid in the construction of said road were claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to said Dalles Military Road Co., or that any portion of the grant of

lands in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road was excepted from said grant or claimed to be excepted from said grant by the United States, on account of the same being included in any grant to the Northern Pacific Railroad Company or any other company or person.

XIII.

And your orator further shows unto your Honors that afterwards, to-wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the city of San Francisco, in the State of California, leaving a widow, Eleanor Martin, and leaving as his heirs, Thomas S. Martin, Edward Martin and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors that in March, 1882, the interest of said minors in said lands were sold at a guardian sale by order of the County Court of the State of Oregon for the County of Wasco,, at which sale the interest of said minors in said land was purchased in good faith, for a valuable consideration, by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by Exhibit "B" attached hereto and made a part hereof; that at the time of the purchase of said lands by said Peter Donahue and James Phelan neither of them had any notice or knowledge, actual or constructive, that any portion of the lands within the limits of the grant made

as aforesaid by Congress to the State of Oregon to aid in the construction of said road or within the indemnity limits was claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to the said Dalles Military Road Company, or was claimed by the United States or any corporation or person to be excepted from said grant or to have been excepted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company or to any corporation or person or for any other reason; that on the 11th day of August, 1884, all the heirs of the said Edward Martin and all persons who held an interest by purchase in said lands, to-wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker and Joseph W. Winans, sold and by deed conveyed all their interest in the said lands to the Eastern Oregon Land Company, a corporation duly incorporated and organized under the laws of the State of California as will more fully appear by Exhibit "C" attached hereto and made a part hereof.

XIV.

And your orator further shows unto your Honors that the said Dalles Military Road Co., duly selected, among other lands forming a portion of its said grant of lands in place, and which had been duly earned by the construction of its said wagon road, the following described land.

to-wit: The northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian, and situated in the county of Sherman, and State of Oregon, the same lying within the limit of the grant of land in place to the said State of Oregon by the said Act of February 25th, 1867, to aid in the construction of the said military wagon road, and being a portion of the lands withdrawn in favor of said Dalles Military Road Co. on the said 18th day of December, 1869, and being situated on the south side of the said line of the general route of the Northern Pacific railroad as delineated on said map filed by said company on the 13th day of August, 1870, and being situated more than twenty miles and less than forty miles from said line of general route of the Northern Pacific railroad, and being then unoccupied land and there being no claim thereto adverse to the said company, and that said selection was embraced in list No. , and said list was duly certified by the register and receiver of the local land office at Dalles City to the commissioner of the general land office at Washington City, District of Columbia.

XV.

And your orator further shows unto your Honors that the Congress of the United States by an act entitled "An Act to grant lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, etc.," approved July 2nd, 1864, created

the corporation of the Northern Pacific Railroad Company, and authorized it to build a railroad from a point on Lake Superior, in Wisconsin or Minnesota, westerly by the most eligible route north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch via the Columbia river to a point at or near Portland, in the State of Oregon, and granted to said company every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty odd sections to the mile on each side of said railroad line as said company might adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passed through any state and whenever on the line thereof the United States had full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, and whenever prior to said time any of said sections or parts of sections should have been granted, sold, reserved or occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

XVI.

And your orator further shows unto your Honors that

by a joint resolution entitled "A resolution authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31st, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Co. to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main branch line across the Cascade Mountains to Puget Sound.

XVII.

And your orator further shows unto your Honors that on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Co. filed a map or plat of the general route of its road and filed the same in the office of the commissioner of the general land office and presented the same to the then secretary of the interior, showing among other things the general route of its said road following the Columbia river from Wallula in the then Territory of Washington to a point on the north side of said river opposite Portland in the State of Oregon, and the secretary of the interior did on the 13th day of August, 1870, accept said map and direct the honorable commissioner of the general land office to withdraw on account of the grant to the said Northern Pacific Railroad Com-

pany from sale, pre-emption, homestead or other disposal all odd numbered sections not sold or reserved and to which prior rights had not attached within twenty miles on each side of the route of the said Northern Pacific Railroad Company lying south of the town of Steilacoom, in the State of Washington, and that on the 27th day of October, 1870, the honorable secretary of the interior department wrote to the honorable commissioner of the general land office as follows:

Department of the Interior,
Washington, D. C., Oct. 27, 1870.

Sir: In my letters of the 13th and 16th inst. last, a withdrawal of lands for twenty miles on each side of the route of the Northern Pacific Railroad in Washington was ordered to be made. That withdrawal will be increased to forty miles on each side of the route, and you will issue instructions accordingly.

Very respectfully your obedient servant,

J. D. COX, Secretary.

To Hon. John S. Wilson, Commissioner of the General Land Office.

XVIII.

And your orator further shows unto your Honors that the line of the road of the said Northern Pacific Railroad Company between Wallula and Portland or to a point opposite Portland was never surveyed, that the said line of said road between the said points was never definitely located or fixed by said Company, that no map of the defin-

ite location of said road was ever filed in the office of the commissioner of the general land office at Washington City or in the interior department, that the said Northern Pacific Railroad Company never constructed any portion of its said road between the said town of Wallula and the said city of Portland, and that the grant made or claimed to have been made by said last mentioned act of Congress and the said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland; and that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never took effect and the said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by said act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said wagon road.

XIX.

And your orator further shows unto your Honors that upon the filing of the said map of general route of the line of its road by the said Northern Pacific Railroad Company with the commissioner of the general land office on the 13th day of August, 1870, the secretary of the interior directed the withdrawal of the odd numbered sections lying within the supposed limits of the grant of lands in place to the Northern Pacific Railroad Company

as aforesaid, but did not determine or designate the number of sections to the mile or the limits of the supposed grant of lands in place to the Northern Pacific Railroad Company within the State of Oregon, but that the honorable commissioner of the general land office erroneously and wrongfully transmitted to the local land offices in Oregon plats showing the general route of the road of the said Northern Pacific Railroad as located and designated upon the said map filed by the secretary of the interior August 13th, 1870, and showing the limit of the grant in place to the Northern Pacific Railroad Company to be in Oregon between Wallula and Portland forty miles south of the line of said general route of its road, that the lands in place granted to the State of Oregon by the act of February 25th, 1867, to aid in the construction of said wagon road and which had been by the Commissioner of the general land office withdrawn in favor of the Dalles Military Road Co. on the 18th day of December, 1869, situated within forty miles of the line of the general route of said Northern Pacific Railroad as designated on said maps were included within the limits of the lands in place designated upon the said maps transmitted to the register and receiver of the local land offices in Oregon as the limits of the lands in place granted to the said Northern Pacific Railroad Company, and that the register and receiver of the said local land offices in Oregon, and the honorable commissioner of the general land office and the honorable secretary of the interior have since wrongfully claimed and the United States now wrongfully claims that the lands situated

within the limits of the grant in place to the State of Oregon by the said act of February 25, 1867, and lying within forty miles of the line of the general location of the road of said Northern Pacific Railroad Company, as designated aforesaid, were excepted from the grant to the State of Oregon under said act and had been previous of the date of the passage of said grant granted to the Northern Pacific Railroad Company and upon the alleged forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company became public lands of the United States.

XX.

And your orator further shows unto your Honors that by an act of Congress to forfeit certain lands theretofore granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29th, 1890, the United States resumed title to and restored to the public domain so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroad not then completed and in operation for the construction or benefit of which such lands were granted.

XXI.

And your orator further shows unto your Honors that after the passage of said act the secretary of the interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line of the general route

of the said road of the Northern Pacific Railroad Company between Wallula and a point on the north side of the Columbia river opposite the city of Portland, in the State of Oregon, as said line was traced and designated on the said map of general route filed by the said Northern Pacific Railroad Company in the office of the commissioner of the general land office on the 13th day of August, 1870, as aforesaid, had been granted to said Northern Pacific and were reserved and excepted from the said grant made to the State of Oregon by the said act of February 25th, 1867, to aid in the construction of said wagon road, and that by said act of Congress forfeiting unearned railroad grants the said lands within the limits aforesaid had reverted to and become public lands of the United States open to settlement and sale under the land laws of the United States providing for the sale and disposal of the public land, although the said lands were also within the limits of the grant in place to said Dalles Military Road Company.

XXII.

And your orator further shows unto your Honors that the said secretary of the interior thereupon caused the said lands to be opened to settlement and sale and thereupon the defendant settled upon the said tract of land hereinbefore described as: The northeast quarter and the southeast quarter of section fifteen in township five, south of range seventeen, east of the Willamette meridian, and situated in the County of Sherman and State of

Oregon, and made application to purchase the same under the act of Congress making further provision for the sale of public land, approved Apr. 24, 1820, and such proceedings were thereafter had upon said application that on the 28th day of Sept., 1894, the President of the United States issued a patent for the same to the said defendant, a copy of which is hereto attached, marked Exhibit "D"; that said secretary of the interior had no jurisdiction or authority to open the said lands within the limits of the grant of lands in place to the State of Oregon to aid in the construction of said Dalles Military Road Co. to settlement or to permit the defendant to settle upon or purchase the said lands and the President of the United States had no jurisdiction or authority to issue a patent therefor.

XXIII.

And your orator further shows unto your Honors that at and before the time the defendant settled upon said tract of land and made claim thereto and made application to purchase the same, he, the said defendant, well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Co. and that the same were claimed by the said Dalles Military Road Co. and by its successors and assigns under said grant.

XXIV.

And your orator further shows unto your Honors that if it had been true that the lands in Oregon within forty

miles of the general route of the said Northern Pacific Railroad Company's road between Wallula and Portland, as designated on said map of the general route of its road filed by the said Northern Pacific Railroad Co. with the secretary of the interior on the 13th day of August, 1870, had been granted to the said Northern Pacific Railroad Co. by the said act of July 2nd, 1864, and the said joint resolution of May 31st, 1870, said grant had taken effect and that the said lands within the limits aforesaid were excepted from the grant to the said Dalles Military Road Co., this plaintiff being a bona fide purchaser of said lands would have had a preference right to apply for and purchase the lands so patented to the defendant by the United States, under the provisions of section five of an act of Congress, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3rd, 1867, but that your orator received no notice and had no notice or knowledge of the application of the said defendant to purchase said land and no opportunity to apply to purchase the same under the provisions of said section five or otherwise.

XXV.

And your orator further shows unto your Honors that a patent having been issued to the defendant for the said lands, the interior department of the United States has no longer jurisdiction of the same and cannot give to your orator the most convenient and conclusive evidence of

his title to said land and cannot issue to your orator a patent for the same as required by the said act of June 18th, 1874, until the patent to the defendant has been canceled, annulled and set aside; and that said patent is a cloud upon the title of your orator to said lands described therein, and that your orator is remediless in a court of law.

Your orator therefore prays that the said patent issued to the defendant described in this bill of complaint be decreed fraudulent and void and be canceled and annulled; that your orator may be decreed to be the owner in fee simple of the land described in said patent and entitled to the immediate possession thereof, and may have the process of this Court to put it into possession thereof; or if it shall be determined by the Court that the said defendant has acquired by said patent or otherwise any legal right or title to the property described therein, that he be declared the trustee of said right or title for your orator and be ordered and decreed to convey the said land to it, and that your orator may have such other and further relief as the facts will warrant or as to equity seems meet; that the writ of subpœna may issue requiring the defendant to appear in this regard under certain pains and penalties therein prescribed and answer to the foregoing bill of

complaint, and that the defendant pay the costs, expenses and disbursements of this suit.

THE EASTERN OREGON LAND CO.

[Seal.] By T. P. BEACH, Secretary.

JAMES K. KELLY,
J. N. DOLPH,
RICHARD NIXON,
C. V. DOLPH.
Solicitors for Complainant.

City and County of San Francisco, } ss.
State of California, }

I, T. P. Beach, being first duly sworn, say that I am the secretary of the Eastern Oregon Land Company, complainant above named, and that the statements contained in the foregoing bill of complaint are true, as I verily believe.

T. P. BEACH.

Subscribed and sworn to before me this 6th day of July, 1896.

[Seal.] A. J. PORTER,
Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A."

Deed—Dalles Military Road Company, to Edward Martin —Filed for Record on the 31st day of May, A. D. 1876.

This indenture, made and entered into this 31st day of May, A. D. 1876, between the Dalles Military Road Company, a corporation duly incorporated, organized and existing under the laws of the State of Oregon, having its principal office and place of business at Dalles City, Wasco county, State of Oregon, the party of the first part, and Edward Martin, of the City and County of San Francisco, State of California, the party of the second part:

Witnesseth: That the said party of the first part, the Dalles Military Road Company, a corporation as aforesaid, for the sum of one hundred and twenty-five thousand dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, released and conveyed, and by these presents, it does grant, bargain, sell, release and convey unto the said party of the second part, his heirs and assigns, all the land lying and being in the State of Oregon granted or intended to be granted to said State by Act of Congress approved February 25th, 1867, entitled, "An Act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from Dalles City on the Columbia River to Fort Boise on the

Snake River," and the right to a patent or patents for said lands granted to said party of the first part by Act of Congress approved June 18th, 1874, entitled, "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which said lands were granted or intended to be granted by the State of Oregon to the said Dalles Military Road Company, by an Act of the Legislative Assembly of said State of Oregon, approved October 20th, 1868, entitled, "An Act donating certain lands to the Dalles Military Road Company," which said several Acts are hereby made part hereof, and all the right, title and interest acquired or to be acquired by the party of the first part under the said several acts hereinbefore referred to, or either of them; and also all future right, title, interest, claim, property and demand, which the party of the first part may at any time hereafter acquire to said lands or any part thereof, or to any lands or to any patents or patent therefor by virtue of said Acts of Congress, or either of them, and said Act of the Legislative Assembly of the State of Oregon, whether said lands are surveyed or unsurveyed by virtue of any further compliance or any preceding compliance with the requirements of said Acts or otherwise, subject to the payment by said party of the second part, of whatever may be due the United States for entering and patenting said lands.

It being the intention of the party of the first part to convey, and it does hereby convey to the party of the second part the said lands, and all the right, title and interest acquired by said party of the first part, under said

Acts or either of them in said lands, or any part thereof, or any lands, being the interest in and to the lands and premises hereinbefore described, together with any and all future interest that it may hereafter acquire or now possess, by virtue of any further compliance with all or any of said several Acts referred to; reserving and excepting from this conveyance, however, all sales of lands heretofore made by the party of the first part.

The said party of the first part hereby covenants and agrees with the party of the second part, that it will at any time when desired by said party of the second part, make to him, his heirs and assigns, any further conveyance and assurance of title to the lands aforesaid, and every part thereof, and said party of the first part covenants and agrees with said party of the second part to keep up its corporate organization and to do every act and thing necessary and requisite to perfect the title to all the lands included in the grant aforesaid.

To have and to hold the lands hereby granted and every part and parcel thereof unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the said party of the first part has caused its corporate seal to be affixed to these presents, and the same to be signed by its President and Secretary by resolution of the Board of Directors thereof duly passed to that effect at Dalles City, Wasco County, State of Oregon, this 31st day of May, 1876.

P. J. MARTIN, Pres. D. M. R. Co.

C. N. THORNBURY, Sec. D. M. R. Co.

And witness the seal thereof.

Signed, sealed and delivered in the presence of
[Seal.] BEN KORTEN.
J. B. CONDON.

State of Oregon, } ss.
County of Wasco. }

On the thirty-first day of May, A. D. 1876, before the undersigned, a Notary Public in and for Wasco County, State of Oregon, came the above-named P. J. Martin, President of the Dalles Military Road Company, and C. N. Thornbury, Secretary of said Company, both of whom are well known to me to be the persons described and who executed the foregoing conveyance, and the said P. J. Martin acknowledged to me that he had executed the said conveyance as President of the said Dalles Military Road Company for the objects and purposes therein stated in compliance with a resolution passed by the Board of Directors of said Company on the 31st day of May, A. D. 1876, and the said C. N. Thornbury acknowledged to me that he had executed the said conveyance for the purpose therein set forth, and in attestation thereto affixed to said conveyance the corporate seal of the Dalles Military Road Company as Secretary thereof, in compliance with a resolution of the Board of Directors of said Company.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal on the day and year first above written in this petition.

[Seal] JAMES B. CONDON,
Notary Public for Oregon.

Exhibit "B."

This indenture, made the twenty-first day of March, A. D. 1882, by and between Eleanor Martin, the duly appointed and qualified guardian of the persons and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, party of the first part, and Peter Donahue and James Phelan of the City of San Francisco, State of California, parties of the second part, witnesseth:

That, whereas, on the 3rd day of January, A. D. 1882, the county court of Wasco county, in the State of Oregon, made an order and license of sale authorizing the said party of the first part to sell certain real estate of the said minors, situate in the counties of Wasco, Grant and Baker, in the State of Oregon, and particularly described in the said order and license of sale, and which said order and license of sale now on file and of record in the said county court, Wasco county, are hereby referred to and made a part of this indenture; and

Whereas, under and by virtue of the said order and license of sale, and pursuant to legal notices given thereof, the said party of the first part on the 6th day of Feb-

ruary, A. D. 1882, at 2 o'clock noon, at the courthouse door, at The Dalles, in the county of Wasco, State of Oregon, offered for sale at public auction, and subject to confirmation by the said County Court of Wasco county, the portion of the said real estate situated in the said county of Wasco, and specified and described in said order and license of sale, as aforesaid; and at such sale the said parties of the second part became the purchasers of the whole of the said real estate hereinafter particularly described, situated in Wasco county aforesaid, for the sum of $57,500, they being the highest and best bidders, and that being the highest and best sum bid for the same; and

Whereas, the said County Court of Wasco county, upon a due and legal return of her proceedings under the said order and license of sale made by the said party of the first part on the 24th day of February, 1882 did on the 6th day of March, A. D. 1882, make an order confirming the said sale and directing conveyances to be made, executed and delivered to the said parties of the second part, and which order of confirmation now on file and of record in the said County Court of Wasco county is hereby referred to and made a part of this indenture:

Now, therefore, the said Eleanor Martin, the guardian of the persons and estates of the said minors, James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, as aforesaid, the party of the first part, pursuant to the order last aforesaid of the said County Court of Wasco County, for and in consideration of the said sum of $57,500 to her in hand paid by the said parties of the second part, the receipt whereof is

hereby acknowledged, has granted, bargained, sold and conveyed unto the said parties of the second part, their heirs and assigns forever, all the right, title, interest and estate of the said James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, in and to all that part of the lands known as The Dalles Military Road lands, which are situate, lying and being in the county of Wasco, State of Oregon, the said Dalles military road lands, being the alternate sections of the public lands of the United States as surveyed or to be surveyed by the United States, designated by odd numbers, to the extent of three sections in width on each side of the military road constructed by The Dalles Military Road Company from Dalles City on the Columbia river to Fort Boise on the Snake river, and including such lieu lands as have been or may hereafter be selected and located, not exceeding ten miles in distance from said road under and in pursuance of the Act of Congress entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia river to Fort Boise on the Snake river," passed February 25, 1867, and any other acts of Congress and the acts of the Legislative Assembly of the State of Oregon relating or pertaining to the said Dalles Military Road lands, saving and excepting those portions of the Dalles military road lands which have been heretofore lawfully sold and conveyed by the said Dalles Military Road Company to other persons than Edward Martin and by said Edward Martin in his life time, the said lands so previously conveyed not being in-

cluded in this sale and conveyance, which said lands are listed in part only and amount to 247,230 acres, more or less. The interest of said minors in and to the above-mentioned and designated lands so sold is five-eighths of three-fourths thereof, subject to the right of dower therein and thereto held by and belonging to Eleanor Martin, the widow of Edward Martin, deceased.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in any wise appertaining.

To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the parties of the second part, their heirs and assigns, to their sole use, benefit, and behoof forever.

In witness whereof, the said party of the first part, guardian as aforesaid, has hereto set her hand and seal the day and year first above written.

[Seal] ELEANOR MARTIN,

Guardian of the persons and Estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, Minors.

Signed, sealed and delivered in the presence of:

T. P. BEACH,

SAM'L S. MURFEY.

State of California,
City and County of San Francisco } ss.

On this 22nd day of March, A. D. 1882, personally came before me, Samuel S. Murfey, a commissioner of deeds for the State of Oregon, residing in the City and County of San Francisco, State of California, Eleanor Martin, guardian of the persons and estate of James Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, to me personally known to be the identical person described in and who executed the foregoing deed and who acknowledged to me that she executed the same as guardian aforesaid freely for the uses and purposes therein named.

In witness whereof, I have hereunto set my hand and affixed my official seal this 22nd day of March, A. D. 1882.

[Seal.] SAM'L S. MURFEY,
Commissioner of Deeds for the State of Oregon.

Exhibit "C."

Deed—Peter Donahue et al. to the Eastern Oregon Land Co.—Filed October 15th, 1884, at 10:30 A. M.

This indenture, made and entered into this eleventh day of August, A. D. one thousand eight hundred and eighty-four by and between Peter Dohohue and Annie Donahue, his wife, D. V. B. Henarie and Mary A. Hen-

arie, his wife, Eleanor Martin, P. J. Martin and Margaret A. Martin, his wife, of the City and County of San Francisco, State of California, and James V. Martin of the City and County of Los Angeles, State aforesaid, and Thos. S. Martin and Ada B. Martin, his wife, and Edward Martin, of the City of Portland, State of Oregon, and Barton L. Walker and Genevieve E. Walker, his wife, of the City of Washington, District of Columbia, parties of the first part, and the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California and having its office and principal place of business in the City and County of San Francisco, the party of the second part.

Witnesseth: Whereas, the said parties of the first part are the owners of and have each an undivided interest in common in the lands hereinafter mentioned and described in the respective proportions following, to-wit: The said Peter Donahue three-sixteenths (3-16), the said D. V. B. Henarie four-sixteenths (4-16), the said Eleanor Martin four-sixteenths (4-16), the said P. J. Martin one-sixteenth (1-16), the said James V. Martin one-sixteenth (1-16), the said Thomas S. Martin one-sixteenth (1-16), the said Edward Martin one-sixteenth (1-16), and the said Genevieve E. Walker one-sixteenth (1-16); and whereas the said parties of the first part have negotiated with the said party of the second part for the sale of the said lands upon terms which have been mutually agreed upon by and between the several and respective parties hereto of the first and second parts; Now, therefore, in consideration of the premises and of the sum of one dollar lawful money of the United States of America to each of them

in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm into the said party of the second part, its successors and assigns, all those certain lands situate, lying and being in the counties of Wasco, Grant and Baker, State of Oregon, granted to the State of Oregon by the Act of Congress of the United States of America entitled: "An Act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from Dalles City on the Columbia river to Fort Boise on the Snake river, approved February 25th, A. D. 1867, and granted to the said Dalles Military Road Company by an Act of the Legislative Assembly of the said State of Oregon, entitled, "An Act donating lands to the Dalles Military Road Company," approved October 20th, 1868, being the lands conveyed to Edward Martin, now deceased, by the said The Dalles Military Road Company by its deed bearing date May 31st, 1876, and duly recorded in the office of the County Clerk of the said County of Wasco on the 31st day of May, A. D. 1876, in Vol. "E," page 435, and in the office of the County Clerk of the said County of Grant on the 3d day of June, A. D. 1876, in Book "C," page 195, and in the office of the County Clerk of the said County of Baker on the 7th day of June, A. D. 1876, in Book "D" of Deeds, page 200, and commonly known and designated as the Dalles Military Road Lands, a portion of which lands are embraced in the County of Crook recently formed or about to be formed of and from a portion or portions of said Wasco and Grant counties, saving

and excepting therefrom and from the operation of this conveyance certain portions and parcels of said Dalles Military Road Lands heretofore sold and conveyed by the said Edward Martin, grantee thereof as aforesaid, in his lifetime and by his successors in interest.

The several and respective interests of the said several and respective parties of the first part by them respectively herein and hereby conveyed being subject to the proper and respective proportions of the debts, charges and expenses belonging thereto respectively, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

P. DONAHUE. [Seal.]

Signed, sealed and delivered in presence of A. Maude Henarie, Eugene W. Levy.

ANNIE DONAHUE. [Seal.]

As to signature of Mary A. Henarie, Annie Martin, Eugene W. Levy.

D. V. B. HENARIE. [Seal.]

As to signature of Margaret A. Martin, Eugene W. Levy and Chas. T. Stanley.

MARY A. HENARIE. [Seal.]

As to signatures of P. Donahue and Annie Donahue, Eugene W. Levy and T. P. Beach.

ELEANOR MARTIN. [Seal.]

As to signature of D. V. B. Henarie, Eugene W. Levy and T. P. Beach.

P. J. MARTIN. [Seal.]

Witnesses as to signature of Eleanor Martin, Eugene W. Levy and T. P. Beach.

MARGARET A. MARTIN. [Seal.]

As to signature of P. J. Martin, and James V. Martin, Eugene W. Levy and Chas. T. Stanley. [Seal.]

JAMES V. MARTIN. [Seal.]

As to signature of Edward Martin, Eugene D. White and Arthur E. Sloan.

THOS. S. MARTIN. [Seal.]

Witness to signature of Thos. S. Martin, Eugene D. White and Arthur E. Sloan. [Seal.]

ADA B. MARTIN. [Seal.]

Witness to signature of Ada B. Martin.

EDWARD MARTIN. [Seal.]

Witnessess to signatures of B rton L. Walker and Genevieve Walker, John E. Beal and Albert D. Gilner.

BARTON L. WALKER. [Seal.]

GENEVIEVE WALKER. [Seal.]

STATE OF OREGON,
County of Multnomah. } ss.

Be it Remembered that on this eighteenth day of August, 1884, before me the undersigned, a Notary Public in and for said county and state, personally appeared the within named Thos. S. Martin and Ada B. Martin, who are known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same, and Ada B. Martin, wife of the said Thos. S. Martin, on an examination made by me separate and apart from her said husband acknowledged to me that she executed the same freely and voluntarily and without fear, coercion or compulsion from any one.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal the day and year last above written.

[Seal.] EUGENE D. WHITE,
Notary Public for Oregon.

State of California,
City and County of San Francisco. } ss.

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a Commissioner of Deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the City and County of San Francisco, State of California,

personally appeared James V. Martin and Edward Martin, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

State of California,
City and County of San Francisco. } ss.

On the 11th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, ,a Commissioner of Deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the City and County of San Francisco, State of California, personally appeared Peter Donahue and Annie Donahue, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Annie Donahue,

on examination and separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon, in California.

State of California,
City and County of San Francisco. } ss.

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a Commissioner of Deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the City and County of San Francisco, State of California, personally appeared D. V. B. Henarie and Mary A. Henarie, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned, and the said Mary A. Henarie on examination separate and apart from her said husband duly acknowledged to me that she ex-

ecuted the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

State of California,
City and County of San Francisco. } ss.

On this eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a Commissioner of Deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared P. J. Martin and Margaret A. Martin, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Margaret A. Martin on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon, in California.

State of California,
City and County of San Francisco. } ss.

On the 25th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a Commissioner of Deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared Eleanor Martin (widow), to me personally known to be the identical person whose name is subscribed to, who is described in and who executed the annexed and within instrument; and she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon, in California.

District of Columbia,
City and County of Washington. } ss.

On the 12th day of September, one thousand eight hundred, city of Washington, D. C., personally appeared Barton L. Walker and Genevieve E. Walker, his wife, to me personally known to be the identical persons whose names are subscribed to and who are described in and who executed the annexed and within instrument; and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Genevieve E. Walker on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JOHN E. BEALL,

A Commissioner of Deeds for the State of Oregon in and for the District of Columbia.

Exhibit "D."

The United States of America:

To All to Whom These Presents Shall Come, Greeting:

(Certificate No. 3904.)

Whereas John D. Wilcox of Sherman County, Oregon,

has deposited in the general land office of the United States a certificate of the register of the land office at The Dalles, Oregon, whereby it appears that full payment has been made by the said John D. Wilcox according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of Public Lands," and the acts supplemental thereto, for the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeeen east of the Willamette Meridian in Oregon, containing three hundred and twenty acres, according to the official plat of the survey of the said lands, returned to the general land office by the surveyor general, which said tract has been purchased by the said John D. Wilcox.

Now Know ye, That the United States of America in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John D. Wilcox and to his heirs, the said tract above described.

To have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said John D. Wilcox and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowl-

edged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted a right of way thereof for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the City of Washington the twenty-eight day of September, in the year of our Lord one thousand eight hundred and ninety-four and of the Independence of the United States the one hundred and nineteenth.

[Seal] By the President,
GROVER CLEVELAND.
By E. Macfarland,
Asst. Secretary.

Recorded Vol. 8 a, page 222.
L. Q. C. LAMAR,
Recorder of the General Land Office.

Filed for record Feb. 28th, A. D. 1895, at 8:20 o'clock, A. M.

[Endorsed]: Filed July 8, 1896. J. A. Sladen, Clerk.

And afterwards, to wit, on the 8th day of July, 1896, there was issued out of said court a subpœna ad respondendum in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.
No. 2325.

Subpoena ad Respondendum.

The President of the United States of America, to John D. Wilcox, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the court room thereof, in the city of Portland, in said District, on the first Monday of August next, which will be the third day of August, A. D. 1896, to answer the exigency of a bill of complaint exhibited and filed against you in our said Court, wherein the Eastern Oregon Land Company is complainant, and you are defendant, and further to do and receive what our said Cir-

cuit Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and

[Seal] J. A. SLADEN,
Clerk.
By G. H. Marsh,
Deputy Clerk.

Memorandum pursuant to Equity Rule No. 12 of the Supreme Court of the United States:—The Defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said Court on or before the day at which the above writ is returnable; otherwise the Complainant's Bill therein may be taken pro confesso.

[Endorsed]: Returned and filed July 14, 1896. J. A. Sladen, Clerk.

Return of Civil Process.

United States of America,
District of Oregon. } ss

I hereby certify that on the 13th day of July, 1896, at 4 miles S. W. from Kent, Sherman County, in said District, I duly served the within subpoena ad respondendum upon the therein named John D. Wilcox, by delivering to him personally a true copy of said subpoena ad respondendum, duly certified to by me as U. S. Marshal, together with a copy of the complaint in the within entitled cause, duly certified to by Richard Nixon, of Attorneys for the Plaintiff.

H. C. GRADY,
United States Marshal.
By Geo. Humphrey,
Deputy.

And afterwards, to wit, on the 3d day of August, 1896, there was duly filed in said Court a præcipe for appearance of defendant, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,

vs.

JOHN D. WILCOX,

Praecipe.

To the Clerk of the Above-entitled Court:

You will please enter my appearance as Solicitor in the above-entitled cause for the defendant, John D. Wilcox.

GEARIN, SILVESTONE & BRODIE,
Solicitors.

[Endorsed]: Filed August 3, 1896. J. A. Sladen, Clerk.

And afterwards, to wit, on the 4th day of September, 1896, there was duly filed in said Court an answer, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Answer.

Defendant in the above-entitled suit saving and reserving to himself all benefit or advantage of exception or otherwise to which he may be or become entitled by reason of the many errors, uncertainties, and insufficiencies of the bill of complaint of the complainant herein, for answer thereto or to so much and such parts or portions thereof as it may be material or necessary for him to answer unto, answering says:

1st.

This defendant admits all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of complainant's bill.

2nd.

This defendant admits all the allegations contained in paragraph 10 of complainant's bill except that this defendant denies that on the 31st day of May, 1876, or at the time of the purchase of the lands mentioned in said paragraph 10 or of issuing the deed therefor or at any time Edward Martin had no constructive notice or knowledge that any portion of the lands within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a previous grant to the Northern Pacific Railroad Company, but this defendant alleges in relation thereto that said Edward Martin at the time he made said purchase and received said deed was chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said Acts of Congress and the acts and doings of the said Railroad Company no title could pass to said Dalles Military Road Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17, east of the Willamette Meridian, for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the Act of Congress approved July 2, 1864, entitled, "An Act to Grant Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, etc."

3rd.

The defendant admits all the allegations in paragraph 11 of complainant's bill.

4th.

This defendant admits all the allegations in paragraph 12 of complainant's bill except that this defendant denies that at the time said D. V. B. Henarie made said purchase, or when he paid said money or received the deed as described in said paragraph 12, or at any time, he had no constructive notice that the land so granted to the State of Oregon to aid in the construction of said road was claimed by the Northern Pacific Railroad Company, and denies that said D. V. B. Henaries had not at said or any time constructive notice that said lands in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted from said grant and claimed to be excepted from said grant by the United States on account of the same being included in the grant to the Northern Pacific Railroad Company by said Act of Congress approved July 2nd, 1864. And this defendant alleges in relation thereto that at the time said D. V. B. Henarie made such purchase and at the time he paid one fourth of said purchase money, and at all times was chargeable with constructive notice of the several acts of Congress in relation to said lands, and the effect thereof, and that under said acts of Congress, and the acts and doings of said Railroad Company, no title could

pass to said Dalles Military Road Company for the north east quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette Meridian for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the Act of Congress above referred to and approved July 2nd, 1864, making the grant of lands to the Northern Pacific Railroad Company.

5th.

This defendant admits all the allegations contained in paragraph 13 of complainant's bill, except this defendant denies that at the time of the purchase of said lands by Peter Donahoe and James Phelan, as set out in said paragraph, said Peter Donahoe and James Phelan did not have constructive notice that said lands so purchased were within the limits of the grant made by Congress to the Northern Pacific Railroad Company, and that the same were claimed by said Northern Pacific Railroad Company, and were claimed by the United States to be exempted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company. And this defendant alleges in relation thereto that the said Peter Donahoe and James Phelan were chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said acts of Congress, and the acts and doings of said Railroad Company, no title could pass to said Dalles Military Road

Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette Meridian: reason that the same was included in the grant to the Northern Pacific Railroad Company above referred to, approved July 2, 1864, making the grant of lands to the Northern Pacific Railroad Company.

6th.

This defendant admits all the allegations in paragraphs 14, 15, 16, and 17 of complainant's bill, and in relation to the facts set out in said paragraph 17 of complainant's bill, this defendant further says that on March 6, 1865, the then secretary of the interior received from Josiah Perham, the then president of the Northern Pacific Railroad Company, a certain letter of that date, a copy of which letter is filed herewith and made a part hereof, marked "Exhibit A." That accompanying said letter was the map referred to therein, a copy of which is herewith filed and made a part hereof, marked Exhibit "B." That on March 9th, 1865, the then secretary of the interior transmitted said map to the then commissioner of the general land office, with letter, a copy of which is filed herewith and made a part hereof marked Exhibit "C." That on June 22, 1865, the then commissioner of the general land office returned said map to the secretary of the interior with a letter, a copy of which, with its endorsement, is filed herewith and made a part hereof marked Exhibit "D."

7th.

This defendant answering paragraph 18 of complainant's bill denies that the grant of lands made by said Act of Congress of July 2nd, 1864, and said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland: denies that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never took effect. Denies that said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by the Act of Congress of February 27th, 1867, to the State of Oregon to aid in the construction of said wagon road.

8th.

Answering paragraph 19 of the complainant's bill this defendant denies that the commissioner of the general land office erroneously or wrongfully transmitted to the local land offices in Oregon the plats described in said paragraph 19 and alleges in relation thereto that said maps were rightfully transmitted to said land offices and said plats are correct. This defendant admits that the commissioner of the general land office and the secretary of the interior and the United States claim

that said lands were exempted from said grant of the lands to the State of Oregon, and that they had been previous to the passage of said act granted to the Northern Pacific Railroad Company, and upon the forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company, they became public lands of the United States. And the defendant denies said claim is wrongful, and alleges that the same is rightful and that such are the facts.

9th.

This defendant admits the allegations in paragraph 20 of complainant's bill.

10th.

This defendant admits the allegations in paragraph 21 of complainant's bill, except defendant denies that the act of the secretary of the interior as set out in said paragraph was wrongful and alleges that the same was rightful.

11th.

This defendant admits the allegations contained in paragraph 22 of complainant's bill, except that defendant denies that the secretary of the interior had no jurisdiction to open said lands for settlement or to permit the defendant to settle thereon or to purchase the same, and denies that the president had no jurisdiction or authority to issue a patent therefor.

Wherefore this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. L. STORY, and
GEARIN, SILVESTONE & BRODIE,
Solicitors for Defendant.

Exhibit "A" to Answer.

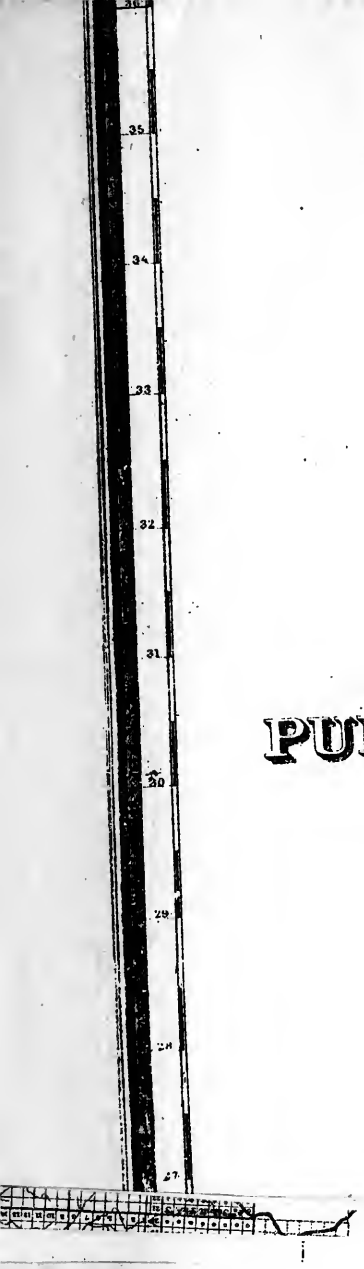
Washington, D. C., March 6, 1865.

Hon. J. P. Usher, Secretary of the Interior.

Sir: Under authority of the Board of Directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your direction the land granted to said company may be marked and withdrawn from sale in conformity to law.

I am respectfully, your obedient servant,

JOSIAH PERHAM,
Pres. N. P. R. R. Company.



MAP

of the

PUBLIC LAND S

and

TERRITORIE

constructed from

The Public Surveys and other offici

in the

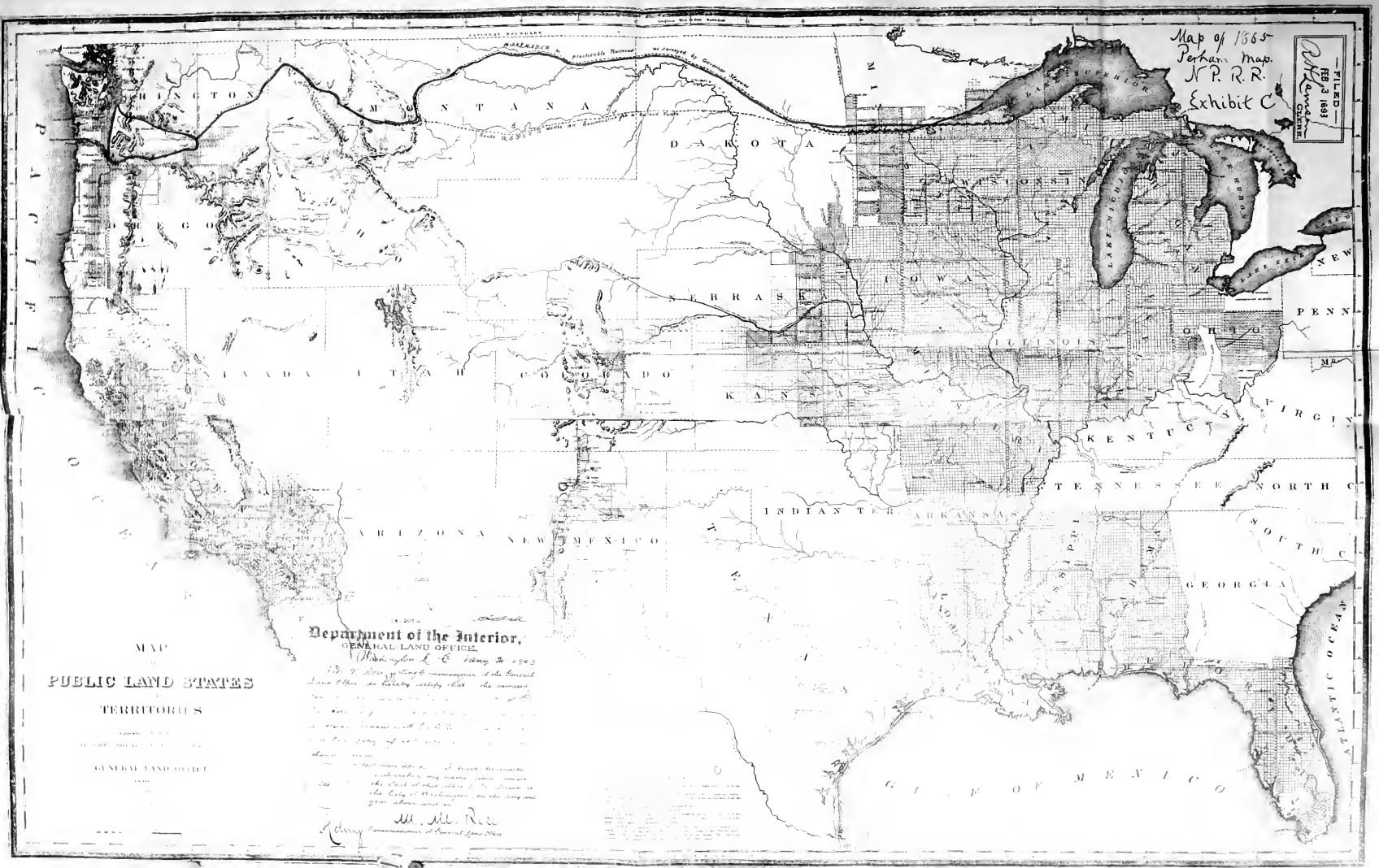
GENERAL LAND OFF

Drawn by J. H. HAWES, Principal Draughtsman

T. FRANKS, Assistant

1864.

EXHIBIT "B"


Map of 1865
Perhaps Map.
N.P.R.R.
Exhibit C
FILED
FEB 3 1893
Clerk
MAP
OF THE
PUBLIC LAND STATES
AND
TERRITORIES
GENERAL LAND OFFICE
Department of the Interior,
GENERAL LAND OFFICE.
Washington D. C. May 2, 1903
M. M. Rice
Commissioner of the General Land Office
PACIFIC OCEAN
ATLANTIC OCEAN
GULF OF MEXICO
MONTANA
DAKOTA
WISCONSIN
IOWA
NEBRASKA
ILLINOIS
OHIO
KANSAS
COLORADO
UTAH
NEVADA
ARIZONA
NEW MEXICO
INDIAN TER.
ARKANSAS
TENNESSEE
KENTUCKY
GEORGIA
LAKE SUPERIOR
LAKE MICHIGAN
LAKE ERIE
PENN

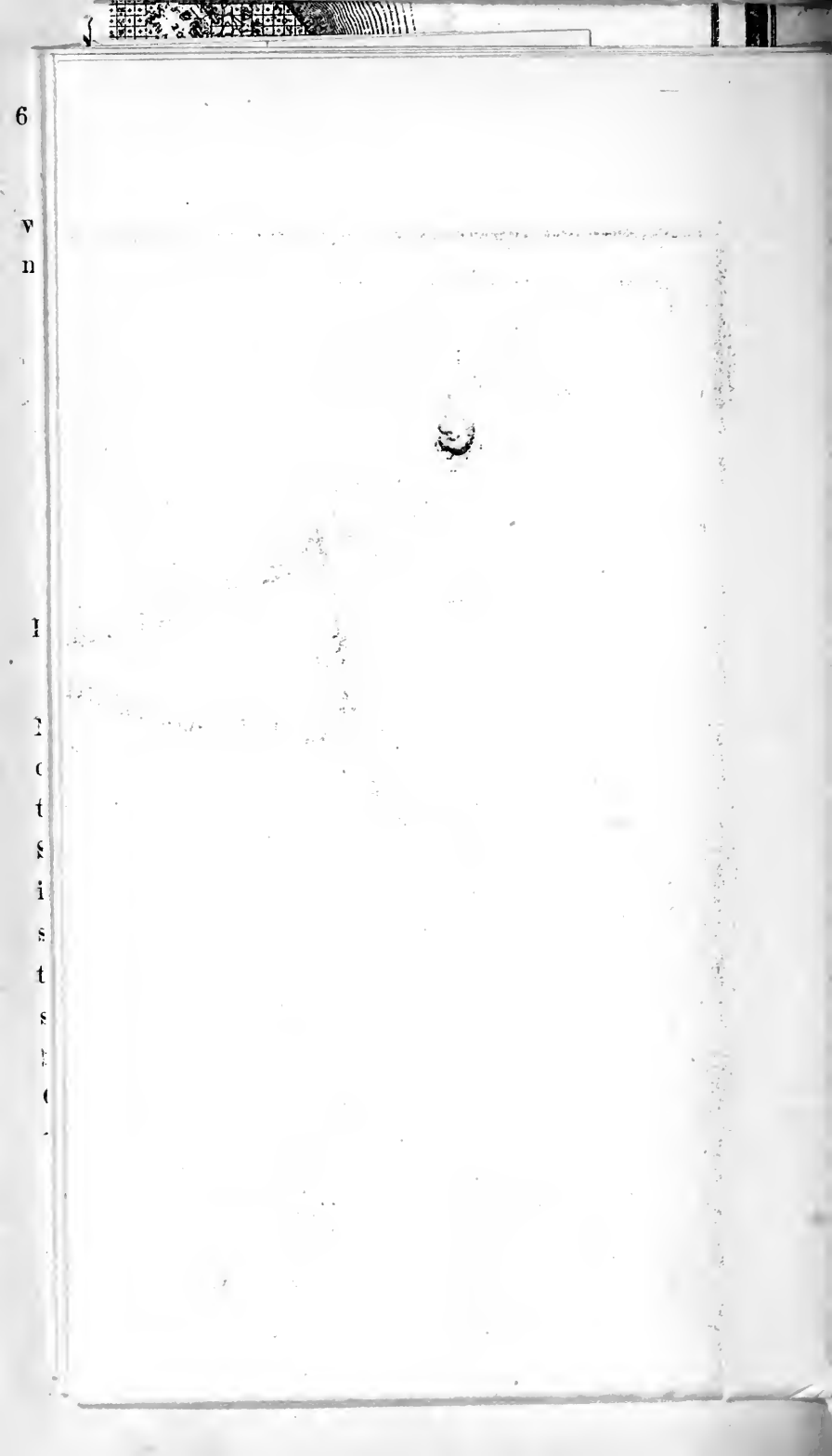


Exhibit "C" to Answer.

Washington, D. C., March 9, 1865.

Sir: Herewith I transmit a map upon which the general line of the Northern Pacific Railroad Company, as adopted by the Board of Directors of that railroad company is delineated; also a copy of the letter of the president of said company dated the 6th instant, requesting that the granted lands along said line be withdrawn from the market in view of the provisions of the 3rd and 6th sections of the Act of Congress approved July 2nd, 1864 (Pamphlet Laws, pages 368, 369). Should you perceive no objection I think that the odd numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin; and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound may be withdrawn as requested as preliminary to the final survey and location of said railroad. The even numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of the Act of Congress.

Very respectfully your obedient servant,

J. P. USHER,

Secretary.

Commissioner of the General Land Office.

Exhibit "D" to Answer.

Department of the Interior,
General Land Office, June 22, 1865.

Sir: The late secretary of the interior, under date of the 9th of March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific Railroad, for which a grant of lands was made by the act approved July 2, 1864 (Stats. at Large, Pamphlet Laws 1864, page 365).

This diagram was filed in the secretary's office, accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the late secretary, no action was here taken upon the application.

Mr. Perham, the president of the railroad company, has called attention to the matter, and in submitting it I have the honor to state: 1. That the present application deals with the railroad system of granting on the largest scale known to congressional legislation. It extends from Lake Superior to the Pacific Ocean, and allowing for probable deflections may be set down at 2,025 miles in length, taking in alternate sections by estimate 47,360,000 acres in a belt of 40 miles wide through the Territories, and 20 miles wide through the States, the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney General Cushing, of December 19th, 1856, and February 16th, 1857 (Opinions of Attorney General, vol. VIII., pages 244 and 290), and

the action of the department, railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

The evidence required of the route under the estab lished ruling of the Department is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

In the judgment of the Commissioner no withdrawal should be ordered until such map is filed in the General Land Office; and although in the Attorney General's opinion—Mr. Cushing—the right takes hold from the date of actual survey on the ground, yet upon that point this office, with deference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascertain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such surveys, we are without the means of ascertaining and determining the interests of rightful claimants until such map is filed.

Now in this view the commissioner reports that no withdrawal should be ordered until the map of actual

survey, authenticated as indicated, shall be filed in the district and General Land Offices.

This may be done, starting from the cul de sac of Lake Superior, the eastern initial point of the route, and stretching thence westwardly to the western boundary of Minnesota, the line of the public survey having been that far established.

2. The same course of proceeding to be had in regard to that portion of the road falling on the western or Pacific side within the range of existing public surveys, out,

3. Of course no withdrawal can now be made on account of the road in the region of country extending across that part of the country between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced, and survey of railroad established in like manner as indicated under first head.

4. A general withdrawal upon conjectural or uncertain basis might result from shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawal which the survey might require to be included.

Then it is not sound policy, nor is there any warrant in our land legislation for doing any act, the tendency of

which would give preference to satisfying a grant on such a stupendous scale as this whilst individual claims under our general system of land laws, homestead preemption and sale would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that too, in the vicinity of a colonial dependence of a powerful nation, would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all different acts of land legislation may be at the same time in full operation, giving precedence to no law over another unless where the terms of law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connections of said portions with the lines of the public sur-

veys, yet respectfully submits the foregoing considerations for such directions as the secretary may be pleased to give in the premises for the government of this office.

With great respect, your obedient servant,

JOS. J. WILSON,
Acting Commissioner.

Hon. Jas. Harlan,
Secretary of the Interior.

State of Oregon, }
County of } ss.

I, John D. Wilcox, being first duly sworn, say on oath that I am the defendant in the above-entitled suit and that the matters therein stated are true of my own knowledge except as to those matters stated on information and belief, and as to such matters I believe the same to be true.

J. D. WILCOX.

Subscribed and sworn to before me this 29th day of August, 1896.

[Seal] J. L. STORY,
Notary Public for Oregon.

District of Oregon, ss.

Due service of the within answer is hereby accepted in the District of Oregon, at Portland, this 4th day of September, 1896, by receiving a copy thereof, duly certified to as such by Geo. A. Brodie, one of the solicitors for de-

fendant, except as to Exhibit "B," a copy of which is waived.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

[Endorsed]: Filed September 4, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 7th day of September, 1896, the same being the 127th judicial day of the regular April term of said court—present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant. } No. 2325

Order.

Now at this day comes the complainant, by J. N. Dolph, of counsel, the defendant appearing by John M. Gearin,

of counsel, and on motion of complainant, the defendant by his said counsel consenting thereto,

It is ordered that the above-entitled suit be, and the same is, set down for hearing upon bill and answer and that it be heard on September 11th, 1896, at eleven o'clock, A. M.

Dated September 7, 1896.

CHARLES B. BELLINGER,
Judge.

[Endorsed]: Filed September 7, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on Friday, the 11th day of September, 1896, the same being the 131st judicial day of the regular April term of said Court—present, the Honorable CHARLES B. BELLINGER United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
vs.
JOHN D. WILCOX,
} No. 2325

Order.

September 11, 1896.

Now, at this day, comes the plaintiff herein, by Mr. J. N. Dolph, of counsel, and moves the Court for a continuance of this cause, heretofore set for Friday, September 11, 1896, whereupon it is ordered that the final hearing of this cause be, and it is hereby, continued to Tuesday, September 15, 1896.

And afterwards, to-wit, on Tuesday, the 15th day of September, 1896, the same being the 134th judicial day of the regular April term of said Court—Present, the Honorable WILLIAM B. GILBERT, United States Circuit Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
vs.
JOHN D. WILCOX.

No. 2325.

Order.

September 15, 1896.

Now, at this day, comes the plaintiff, by Mr. J. N. Dolph, of counsel, and the defendant, by Mr. John M. Gearin, of counsel, and thereupon this cause comes on to be heard upon the bill and answer herein, and the Court having heard the arguments of counsel will advise thereof.

And afterwards, to-wit, on Tuesday, the 5th day of January, 1897, the same being the 79th judicial day of the regular October term of said Court—Present, the Honorable WILLIAM B. GILBERT United States Circuit Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Decree Dismissing Bill of Complaint.

This cause having been heard and submitted to the Court on the 15th day of September, 1896, upon bill and answer, and the Court having taken the same under advisement, and now due deliberation having been had, it is ordered, adjudged, and decreed that the said bill of complaint herein be, and the same is hereby, dismissed, with costs to the complainant to be taxed.

Dated January 5th, 1897.

WM. B. GILBERT, Judge.

[Endorsed]: Filed January 5, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 5th day of January, 1897, there was duly filed in said court, petition for appeal and

an assignment of errors, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Petition for Appeal.

The above named complainant, The Eastern Oregon Land Company, conceiving itself aggrieved by the decree made and entered on the 5th day of January, 1897, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order

was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Jan. 5th, 1897.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

The foregoing claim of appeal is allowed.

Dated January 5th, 1897.

WM. B. GILBERT,
Circuit Judge.

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing petition on appeal on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
Solicitor for defendant and appellee.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Assignment of Errors.

And now on the 5th day of January, 1897, came the complainant, by Dolph, Nixon & Dolph, its solicitors, and says that the decree in the above-entitled cause is erroneous and against the just rights of the complainant, for the following reasons:

First: Because it appears by the bill and answer in said suit that a decree should have been rendered and given therein by said Court in favor of the complainant as prayed for in the bill of complaint, to-wit:

That the patent for the lands in controversy issued by the United States to the defendant described in the bill of complaint was fraudulent and void as against the complainant, and that the same be canceled and annulled;

that complainant was the owner in fee simple of the lands described in said patent and was entitled to the immediate possession thereof and to have the process of the Court to be put in possession thereof, and that the defendant was trustee for the complainant of whatever title was conveyed to him under said patent and that he convey the same to the complainant.

Second: Because it appeared by the bill and answer that the defendant was not entitled to a decree and the Court erred in rendering a decree for the defendant dismissing the complainant's bill.

Third: Because it appeared by the bill and answer in said suit that the land in controversy was granted to the State of Oregon by an "An act of Congress entitled 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City on the Columbia River to Fort Boise on the Snake River," approved February 25, 1867, and had been granted by the State of Oregon to the Dalles Military Wagon Road Company by Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that all the conditions of said grant had been complied with by said company, the definite location and construction and completion of said road had been duly certified to by the Governor of Oregon on the 23rd day of June, 1869, and on said date the said land had been withdrawn from settlement and sale, and the title of the said Wagon Road Company had become absolute before the passage of the joint resolution of May 31st, 1870, authorizing the North-

ern Pacific Railroad Company to locate the main line of its road via the Valley of the Columbia River and that complainant had succeeded to the title of said company.

Fourth: Because the Court erred in holding and deciding that the grant of lands made to the State of Oregon by the said Act of Congress of February 25, 1867, did not come within the exceptions to the grant of land made to the Northern Pacific Railroad Company by the Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route," approved July 2, 1864, and the joint resolution of Congress entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31, 1870.

Fifth: Because the Court erred in holding and deciding that the land in controversy and granted to the Northern Pacific Railroad Company by said Act of July 2, 1864, or the said joint resolution of May 31, 1870.

Sixth: Because the Court erred in holding and deciding that it appeared from the bill and answer that the land in controversy was or ever had been a portion of the said grant to the Northern Pacific Railroad Company.

Seventh: Because the Court erred in holding and deciding that the grant of lands to the said Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, were ever located or fixed so as to at-

tach to any particular parcel of land or to show that the lands in controversy were a part of said grant.

Eighth: Because the Court erred in holding and deciding that the lands in controversy were excepted from the grant to the State of Oregon made to it by the said Act of Congress approved February 25, 1867.

Ninth: Because the Court erred in holding and deciding that the supposed grant to the Northern Pacific Rail-Road Company for its road from Wallula to Portland was ever located or fixed or that said company ever acquired any right or title to the lands in controversy so as to segregate them from the public domain or to prevent the said grant to the State of Oregon from attaching thereto.

Tenth: Because the Court erred in holding that the map referred to in the answer and known as the Perham map was valid or in any manner located the line of the road of the Northern Pacific Railroad Company or located or defined its supposed land grant or reserved or withdrew any lands from the operation of the said grant to the State of Oregon.

Eleventh: Because the Court erred in holding that on account of said grant to the Northern Pacific Railroad Company made by said Act of July 2, 1864, or the said joint resolution of Congress of May 31, 1870, or the transmission by said Company of the said Perham map to the Secretary of the Interior or the filing of said map of August 13th, 1870, of its general route of its road by said Northern Pacific Railroad Company from Wallula to Port-

land or any other matter or proceeding the land in controversy was excepted from the operation of said grant to the State of Oregon.

Twelfth: Because the Court erred in holding and deciding that the land in controversy was forfeited to the United States by the Act of Congress forfeiting grants and had been restored to the public domain and was open to settlement or subject to sale by the United States at the time of the defendant's alleged purchase of the same.

Thirteenth: Because the Court erred in not holding that said defendant had obtained and held the legal title to the land in controversy as trustee for the complainant.

Wherefore the said complainant prays that the said decree be reversed and that the said Court be directed to enter a decree in accordance with the prayer of the bill.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing assignment of error on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
Solicitor for Appellee

[Endorsed]: Filed January 5, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 5th day of January, 1897, there was duly filed in said court, bond for costs on appeal, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY,
Complainant,
vs.
JOHN D. WILCOX,
Defendant.

Bond for Costs on Appeal.

Know All Men by These Presents, that we, The Eastern Oregon Land Company, are held and firmly bound unto John D. Wilcox, the above named defendant, in the sum of two hundred and fifty dollars, to be paid to the said John D. Wilcox, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 5th day of Jan., 1897.

Whereas the above named Eastern Oregon Land Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the

above-entitled cause by the Circuit Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such that if the above named, The Eastern Oregon Land Company shall prosecute said appeal to effect, andanswerall costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE EASTERN OREGON LAND COMPANY,
(sgd.) By DOLPH, NIXON & DOLPH,
Its Attorneys. [L. S.]
(sgd.) CHARLES STERN. [L. S.]
(sgd.) JOHN O'CONNOR. [L. S.]

Signed, sealed, and delivered in the presence of

United States of America,
District of Oregon. } ss.

I, Charles Stern, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said District, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(sgd.) CHARLES STERN.

Subscribed and sworn to before me this 5th day of January, 1897.

[Seal] RICHARD NIXON,
Notary Public for Oregon.

United States of America,
District of Oregon. } ss.

I, John O'Connor, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said District, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(sgd.) JOHN O'CONNOR.

Subscribed and sworn to before me this 5th day of January, 1897.

[Seal] RICHARD NIXON,
Notary Public for Oregon.

The foregoing bond is approved Jan. 5, 1897.

(sgd.) WM. B. GILBERT,
Judge.

[Endorsed]: Filed January 5, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 5th day of January, 1897, there was duly filed in said court a stipulation and order to send original exhibit "B" to answer with transcript, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY,

Complainant,

vs.

JOHN D. WILCOX,

Defendant.

Stipulation and Order.

It is hereby stipulated between the parties to the above-entitled suit, by their respective attorneys, that the map commonly known as the Perham map, attached to the answer of the defendant herein, may be withdrawn from the files and made part of the record to be sent to the United States Circuit Court of Appeals for the Ninth Circuit, the Court consenting thereto.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

JNO. M. GEARIN,
Solicitor for Defendant.

Based upon the foregoing stipulation, it is ordered that the original map referred to be withdrawn from the files

of the Court and made a part of the record on appeal in the above-entitled suit.

WM. B. GILBERT, Judge.

[Endorsed]: Filed January 5, 1897. J. A. Sladen, Clerk.

Clerk's Certificate to Transcript.

District of Oregon, ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in cause No. 2325, The Eastern Oregon Land Company vs. John D. Wilcox, is a full, true, and correct transcript of the record in said cause as the same appears at my office and in my custody.

I further certify that the cost of the foregoing transcript is thirty-four and 20-100 dollars, and that the same has been paid by the appellant, the Eastern Oregon Land Company

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at Portland in said District, this 7th day of January, A. D. 1897.

[Seal] J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

[Endorsed]: No. 348. In the United States Circuit Court of Appeals for the Ninth Circuit. The Eastern Oregon Land Company, Appellant, vs. John D. Wilcox. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Oregon.

Filed Jan. 9, 1897.

F. D. MONCKTON,
Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY,
Appellant,

v.

E. I. MESSINGER,
Appellee,

AND

THE EASTERN OREGON LAND COMPANY,
Appellant,

v.

JOHN D. WILCOX,
Appellee.

Appeal from the Circuit Court of the United States for the District of Oregon.

Appellants' Brief.

DOLPH, NIXON & DOLPH,
and JAMES K. KELLY,
Solicitors for Appellants.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
1897.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY,
Appellant,

v.

E. I. MESSINGER,
Appellee,

AND

THE EASTERN OREGON LAND COMPANY,
Appellant,

v.

JOHN D. WILCOX,
Appellee.

These suits were brought to obtain decrees cancelling United States patents issued to the defendants, purporting to convey to them certain lands described in the complaint. The lands in controversy are within the limits of the grant of lands in place made to the State of Oregon by the Act of Congress approved February 25, 1867, to aid in the construction of a military wagon road. They are claimed by the defendant to be within the overlapping limits of the grant to the Northern Pacific Railroad Company.

The cases were heard in the court below on bill and answer. The bills and answers are alike in both cases, except as to the names of the defendants, the description of the lands claimed by them, and the law of the United States under which they claim to have acquired title to the same. In the case of the Company against Messinger, the land in controversy is situated within twenty miles of the line of the Northern Pacific Railroad Company's road, as designated on the map of the general route of said road, filed by said company August 13, 1870; and in the case of the Company against Wilcox, the land is situated more than twenty miles and less than forty miles from said line.

Precisely the same questions are involved in both suits, except that if the court should be of the opinion that any lands were excepted from the said grant to the State of Oregon by reason of being within the grant of the Northern Pacific Railroad Company, the court will be called upon to decide, in the case of the Company against Wilcox, the question whether the Northern Pacific Railroad Company took by its grant twenty sections to the mile or ten sections to the mile only, in the State of Oregon, between Wallula and Portland.

STATEMENT OF FACTS.

The facts alleged in each bill and admitted by the answer in each suit may be summarized as follows:

THE BILL.

That the complainant is a corporation under the laws of the State of California, and a citizen of that state, and that the defendant is a citizen of the State of Oregon.

That on the 25th day of February, 1867, the Congress of the United States passed, and the President of the United States duly approved, an Act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia river, to a point on Snake river opposite Fort Boise, in Idaho Territory, the alternate sections of public land, designated by odd sections, to the extent of three miles in width on each side of said road, to be exclusively applied to the construction of said road, excepting and reserving from said grant and the operation of said act only lands theretofore reserved or appropriated.

That said act provided that the lands thereby granted should be disposed of by the Legislative Assembly of the State of Oregon for the purpose aforesaid and no other, that said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges for the transportation of any troops, property or mails of the United States, and that the lands thereby granted should be disposed of only in the following manner, that is to say, when the Governor of the state should certify to the Secretary of the Interior that ten coterminous miles of said road were completed, then a quantity of the land granted by the act, not exceeding thirty sections, might be sold, and so on from time to time until said road should be completed.

That by the Act of the Legislative Assembly of the State of Oregon approved October 20, 1868, entitled "An Act dedicating certain lands to the Dalles Military Road Co.," the State of Oregon granted to the said Dalles Military Road Co., a corporation, duly incorporated for the purpose

of constructing said road, all lands, rights of way, rights, privileges and immunities granted or pledged to the State of Oregon by the said Act of Congress, for the purpose of aiding said Dalles Military Road Co. in constructing the road, as mentioned and described in said Act of Congress, and upon the conditions and immunities therein prescribed.

That prior to the 23d day of June, 1869, the said Dalles Military Road Co. surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said Act of Congress and in the said Act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road, and had filed in the executive office of the Governor of the State of Oregon a plat or map of the said Dalles Military Road Co., upon which was traced and shown the definite location of said road, as constructed from its terminus at the Dalles City, Oregon, to its terminus on Snake river, and the limits of the grant of lands in place made to the State of Oregon by the said Act of Congress, to aid in the construction of said road, and also the indemnity limits of the said grant.

That on June 23, 1869, the Governor of Oregon certified that the plat or map of said Dalles Military Road had been duly filed in the executive office, and that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the Act of Congress aforesaid, approved February 25, 1867, and with the said Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868; and the said Governor of Oregon at that date further certified that he

had made a careful examination of said road since its completion, and that the same was built in all respects as required by the conditions of said act, and was then accepted, said certificate being set forth at length in the bill of complaint.

That upon the filing of the said plat or map in the executive office of the Governor of the State of Oregon, showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the Governor of Oregon, certifying to the completion of said road, the grant made by the said Act of Congress of February 25, 1867, to the State of Oregon, to aid in the construction of said road, became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road, as located and constructed.

That the said Dalles Military Road Co. duly filed in the office of the Secretary of the Interior of the United States a map or plat of said Dalles Military Road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the said Governor of the State of Oregon, certifying to the construction of said road, that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States, and was accepted and received and filed in said department, and that on December 18, 1869, the then Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd numbered sections three miles upon each side of said wagon road, as delineated and shown on said map, in favor of the Dalles Military Road Co.

That the Congress of the United States, by an Act approved June 19, 1874, entitled "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon, to aid in the construction of wagon roads, and the certificate of the Governor of Oregon should show that any said road had been constructed or completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands unless the state should by public act have transferred its interest in said lands to any corporation, in which case the said lands were to be patented to such corporation.

That Edward Martin, a citizen of the State of California, placing confidence in the said certificate of the Governor of the State of Oregon, and in said Acts of Congress, and the withdrawal of said lands by the Commissioner of the General Land Office, on the 31st day of May, 1876, purchased in good faith, for the sum of $125,000, then paid by him to the Dalles Military Road Co., all the lands embraced in said grant, except the portions which had been previously sold, and at the time of said purchase and at the time of paying said consideration had no notice or knowledge, actual or constructive, of any claim of the Northern Pacific Railroad Co., or any claim made by any corporation or person or by the Government of the United States, that any portion of the lands granted to the State of Oregon, as aforesaid, were excepted or claimed to be excepted from said grant on account of any previous grant to the Northern Pacific Railroad Co., or otherwise.

That on the 31st day of January, 1877, said Edward

Martin conveyed an undivided one-fourth interest in said lands to D. V. B. Henarie, he the said Henarie having paid one-fourth of the consideration of said conveyance from the Dalles Military Road Co. to Edward Martin, and having made the purchase and paid the consideration in good faith and relying upon the said Acts of Congress and certificate of the Governor of the State of Oregon and the withdrawal of said lands, and that he had no notice or knowledge, actual or constructive, that any portion of the said grant was claimed to be excepted for the reasons aforesaid.

That on the 12th day of May, 1880, said Edward Martin died intestate in the City of San Francisco, leaving certain heirs, who are named in the bill.

That among said heirs were James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors.

That afterwards the interests of the minors in said grant were sold by order of the Probate Court of Wasco County, Oregon, and were purchased at guardian's sale by Peter Donahue and James Phelan, who paid a valuable consideration therefor, and who purchased the same and paid said consideration with no knowledge or notice, actual or constructive, that any portion of the lands within the limits of said grant was claimed by the Northern Pacific Railroad Co., or any other corporation or person, or by the Government of the United States, adversely to the said Dalles Military Road Co.

That afterwards the heirs of said Edward Martin and the said Peter Donahue and James Phelan conveyed the said grant to the Eastern Oregon Land Co., the complainant in the present suits.

That the said Dalles Military Road Co. duly selected, among other lands which had been earned by it by the construction of its said wagon road, the lands in controversy, and that the same were a part of the grant of lands in place to the State of Oregon by the said Act of February 25, 1867, and were a portion of the lands withdrawn in favor of the said Dalles Military Road Co. on the 18th day of December, 1869, and were situated on the south side of the line of the general route of the Northern Pacific Railroad Co., as designated on the said map filed August 13, 1870, and were then unoccupied lands, there being no claim to the same adverse to the company, and that the list containing said selection was duly certified by the Register and Receiver of the Land Office at the Dalles City to the Commissioner of the General Land Office.

That by an Act approved July 2, 1864, Congress granted to the Northern Pacific Railroad Co., to aid in the construction of a railroad from Lake Superior to Puget sound, with a branch, via the Columbia river, to Portland, by the most eligible route, every alternate odd section of public land, not mineral, to the amount of twenty alternate sections to the mile on each side of said road through the Territories of the United States, and ten alternate sections a mile on each side of said road whenever it passed through a state, and whenever on the line thereof the United States had full title not reserved, sold, *granted*, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be *definitely fixed* and the plat thereof filed in the office of the Commissioner of the General Land Office.

That by a Joint Resolution of Congress of May 31, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Co. to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main line across the Cascade mountains to Puget sound.

That on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Co. filed a map or plat of the *general route* of its road, and filed the same in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing among other things the general route of said road, following the Columbia river from Wallula, in the then Territory of Washington, to a point on the north side of said river opposite Portland, in the State of Oregon.

That the Secretary of the Interior accepted said map and directed the Commissioner of the General Land Office to withdraw, on account of the grant to the said Northern Pacific Railroad Co., from sale, pre-emption, homestead or other disposal, the odd numbered sections not sold or reserved, or to which prior rights had not attached, within twenty miles on each side of the route of the said Northern Pacific Railroad.

That the line of the road of said Northern Pacific Railroad Co., between Wallula and Portland, to a point opposite Portland, was never surveyed; that the line of said road between said points was never *definitely located* or fixed by the said company; that no map of definite location

of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department; that the said Northern Pacific Railroad Co. never constructed any portion of its said road between the said Town of Wallula and the said City of Portland.

That upon the filing the said map of the general route of its road by the said Northern Pacific Railroad Co., on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd numbered sections lying within the supposed limits of the grant of lands in place to the Northern Pacific Railroad Co., as aforesaid.

That Congress, by an act forfeiting lands theretofore granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29, 1890, resumed title to and restored to the public domain, so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroads not then completed and in operation, for the construction or benefit of which said lands were granted.

That after the passage of said Act, the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line of the general route of the said Northern Pacific Railroad, between Wallula and a point on the north side of the Columbia river opposite the City of Portland, in the State of Oregon, as said line was designated on said map of general route of the road of said company, filed August 13, 1870, had been granted to the Northern Pacific Railroad Co., and

were reserved and excepted from the said grant made to the State of Oregon by the said Act of February 25, 1867, and had reverted to and became public lands of the United States, open to settlement and sale under the land laws of the United States, and that the said Secretary caused the said lands to be open to settlement and sale, and thereupon the defendant settled upon the said tract of land, and afterwards made application to purchase the same, and that afterwards the President of the United States issued a patent to him for said lands, a copy of which patent is attached to the bill.

That the Secretary of the United States had no jurisdiction or authority to open the said lands to settlement and permit the defendant to settle thereon, and the President of the United States had no jurisdiction or authority to issue a patent therefor.

That at and before the time the defendant settled upon said tract of land, or made claim thereto, or made application to purchase the same, the defendant well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Co., and that the same were claimed by the said Dalles Military Road Co. and its successors and assigns, under said grant.

That if it had been true that the lands in question were excepted from said grant to the State of Oregon, as claimed by the defendant, under the provisions of Section 5 of the Act of Congress entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, the complainant would have been entitled to pur-

chase said lands from the United States, being a bona fide purchaser thereof, without notice of any claim of the said Northern Pacific Railroad Co. to the said lands, but that complainant received no notice and had no notice or knowledge of the application of the defendant to purchase said lands, and had no opportunity to apply to purchase the same under the provisions of said Section 5, or otherwise.

That a patent having been issued for said land, the Interior Department has no longer jurisdiction of the same and cannot give complainant the most convenient and conclusive evidence of its title to the said lands, and cannot issue to complainant patent for the same, as required by the said Act of June 18, 1874, until the patent to the defendant has been cancelled, annulled and set aside, and that said patent is a cloud upon the title of complainant to said land described therein, and complainant is remediless in a court of law.'

THE ANSWER.

By the answer, as we have said, all the material allegations of the bill are as we conceive admitted.

The defendant, answering the allegations of the bill that Edward Martin, the purchaser of the grant from the Dalles Military Road Co., and his grantees and the complainant were bona fide purchasers and had no actual or constructive notice or knowledge that any portion of the lands embraced within the grant to the State of Oregon, to aid in the construction of said wagon road, were excepted therefrom on account of any previous grant to the Northern Pacific, denies that the parties had no *constructive notice*, but alleges *in relation thereto* that at the

time they made said purchase and received their deeds "they were all chargeable with constructive notice of the several Acts of Congress in relation to said lands and the effect thereof, and that under said Acts of Congress and the acts and doings of the said railroad company, no title could pass to the said Dalles Military Road Co. for the lands in question."

Denies that the grant of lands made to the Northern Pacific Railroad Co., between Wallula and Portland, to aid in the construction of a road between said points, never was located or fixed, and that the said railroad company never acquired any right or title or interest to the same.

Denies that the Commissioner of the General Land Office and the Secretary of the Interior wrongfully claim that said lands were excepted from said grant to the State of Oregon on account of being included in the grant to the Northern Pacific Railroad Co.

By the answer also the defendant alleges that on March 16, 1865, the then Secretary of the Interior received from Josiah Perham, the then President of the Northern Pacific Railroad Co., a certain letter of that date, a copy of which is attached to the answer, and that accompanying said letter was a map referred to therein, a copy of which is made part of the answer, and that on the 9th of March, 1865, the Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with a letter, a copy of which is attached to the answer, and that on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior, with a letter, a copy of which is attached to the answer.

These letters show that the map was not received by the Secretary of the Interior or filed, that it was not in accordance with the requirements of the laws of the United States and the regulations of the department, and was rejected.

This map is known as the Perham map, and has been frequently the subject of consideration by the Federal Courts, as we will hereafter show.

ASSIGNMENT OF ERRORS.

And now, on the 5th day of January, 1897, comes the complainant, by Dolph, Nixon & Dolph, its solicitors, and says that the decree in the above entitled cause is erroneous and against the just rights of the complainant, for the following reasons:

First—Because it appears by the bill and answer in said suit that a decree should have been rendered and given therein by said court in favor of the complainant, as prayed for in the bill of complaint, to wit:

That the patent for the lands in controversy issued by the United States to the defendant, described in the bill of complaint, was fraudulent and void as against the complainant, and that the same be cancelled and annulled; that complainant was the owner in fee simple of the lands described in said patent, and was entitled to the immediate possession thereof, and to have the process of the court to be put in possession thereof, and that the defendant was trustee for the complainant of whatever title was conveyed to him under said patent, and that he convey the same to the complainant.

Second—Because it appeared by the bill and answer that the defendant was not entitled to a decree, and the

court erred in rendering a decree for the defendant, dismissing the complainant's bill.

Third—Because it appeared by the bill and answer in said suit that the land in controversy was granted to the State of Oregon by an Act of Congress, entitled "An Act granting lands to the State of Oregon, to aid in the construction of a Military Wagon Road from Dalles City, on the Columbia river, to Fort Boise, on the Snake river," approved February 25, 1867, and had been granted by the State of Oregon to the Dalles Military Road Co. by Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that all the conditions of said grant had been complied with by said company, the definite location and construction and completion of its road, and the fact of said location and completion of said road had been duly certified to by the Governor of Oregon, on the 23d day of June, 1869, and the map of said completed road had been duly filed in the office of the Secretary of the Interior before December 13, 1869, and on said date the said land had been withdrawn from settlement and sale, and the title of the said wagon road company had become absolute before the passage of the Joint Resolution of May 31, 1870, authorizing the Northern Pacific Railroad Co. to locate the main line of its road via the valley of the Columbia river, and that complainant had succeeded to the title of said company.

Fourth—Because the court erred in holding and deciding that the grant of lands made to the State of Oregon by the said Act of Congress of February 25, 1867, did not come within the exceptions to the grant of land made to the Northern Pacific Railroad Co. by the Act of

Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the Northern route," approved July 2, 1864, and the Joint Resolution of Congress entitled "A Resolution authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," approved May 31, 1870.

Fifth—Because the court erred in holding and deciding that the land in controversy was granted to the Northern Pacific Railroad Co. by said Act of July 2, 1864, or the said Joint Resolution of May 31, 1870.

Sixth—Because the court erred in holding and deciding that it appeared from the bill and answer that the land in controversy was or ever had been a portion of the said grant to the Northern Pacific Railroad Co.

Seventh—Because the court erred in holding and deciding that the grant of lands to the said Northern Pacific Railroad Co. between Wallula, Washington, and Portland, Oregon, was ever located or fixed so as to attach to any particular parcel of land or to show that the lands in controversy were a part of said grant.

Eighth—Because the court erred in holding and deciding that the lands in controversy were excepted from the grant to the State of Oregon, made to it by the said Act of Congress, approved February 25, 1867.

Ninth—Because the court erred in holding and deciding that the supposed grant to the Northern Pacific Railroad Co., for its road from Wallula to Portland, was ever located or fixed, or that said company ever acquired any right or title to the lands in controversy so as to segregate them

from the public domain or to prevent the said grant to the State of Oregon from attaching thereto.

Tenth—Because the court erred in holding that the map referred to in the answer, and known as the Perham map, was valid or in any manner located the line of the road of the Northern Pacific Railroad Co., or located or defined its supposed land grant, or reserved or withdrew any lands from the operation of the said grant to the State of Oregon.

Eleventh—Because the court erred in holding that on account of said grant to the Northern Pacific Railroad Co., made by said Act of July 2, 1864, or the said Joint Resolution of Congress of May 31, 1870, or the transmission by said company of the said Perham map to the Secretary of the Interior, or the filing of said map of August 13, 1870, of its general route of its road by said Northern Pacific Railroad Co., from Wallula to Portland, or any other matter or proceeding, the land in controversy was excepted from the operation of said grant to the State of Oregon.

Twelfth—Because the court erred in holding and deciding that the land in controversy was forfeited to the United States by the Act of Congress forfeiting grants, and had been restored to the public domain, and was open to settlement or subject to sale by the United States at the time of the defendant's alleged purchase of the same.

Thirteenth—Because the court erred in not holding that said defendant had obtained and held the legal title to the land in controversy, as trustee for the complainant.

Wherefore the said complainant prays that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayer of the bill.

QUESTIONS INVOLVED.

The decision of these cases depends upon facts concerning which there is no dispute, and conclusions of law to be drawn from the admitted facts.

The assignments of error, which are the same in both cases, may be summarized and the questions presented for decision briefly stated as follows:

First—The map of the general route of the line of the Northern Pacific Railroad, from Wallula to Portland, not having been filed until August 13, 1870, and the road of said company never having been definitely located between said points, and the grant to that company having been forfeited, can it now be maintained that any portion of that company's grant overlapped the grant to the State of Oregon, or can the grant to the Northern Pacific Railroad Co. be set up to defeat the grant to the State?

Second—Were not the lands embraced within the limits of the grant to the State of Oregon by the Act of February 25, 1867, which might have been found to be within the limits of the grant of lands in place to the Northern Pacific Railroad Co. by the Act of July 2, 1864, had the road of said company been definitely located, between Wallula and Portland, within the exceptions to the grant to the Northern Pacific Railroad Co. of lands "reserved, sold, *granted* or otherwise appropriated at the time the line of said road *should be definitely fixed?*"

Third—If lands were excepted from the grant to the State of Oregon on account of the Northern Pacific Railroad grant, was such exception of lands in the State of Oregon ten or twenty sections to the mile?

Fourth—Were the lands in question withdrawn by operation of law, upon the transmission to the Secretary of the Interior of the Perham map, in 1865, so as to except them from the operation of the grant to the State of Oregon?

Fifth—Were Edward Martin and other purchasers of the grant to the State chargeable with such constructive notice of the Act granting lands to the Northern Pacific Railroad Co., and the subsequent rulings of the Secretary of the Interior, as to prevent them from claiming the lands as bona fide purchasers?

The fourth question is included in the second, and the fifth can only be material in considering the right of the complainant to have purchased the lands in controversy under Section 5 of the Act of March 3, 1887, known as the Land Grant Adjustment Act, if its title to the lands under the grant to the State was held to have failed.

It is unnecessary to discuss the proposition that if the grant to the State of Oregon had attached to the lands in controversy before the claim of the defendant thereto was initiated, the defendant having had notice of complainant's claim to title to the lands prior to his settlement and application to purchase, he should be held to be a trustee of whatever right or title he took under his patent for the complainant. The proposition is established beyond question by decisions of the Supreme Court of the United States, that when the title to land has passed from the Government and the question becomes one of private right, the Courts of Equity may enquire whether the party holding the patent should not be treated as a trustee for another, and may decree the party holding the

legal title to convey it to one found to be equitably entitled to the land.

Gildersleeve v. New Mex. Mining Co.

Johnson v. Towsley, 80 U. S. 72, 13 Wall. 72.

BRIEF AND ARGUMENT.

I.

Were the lands in question excepted from the grant to the State of Oregon on account of the grant to the Northern Pacific Railroad Co., the filing of the map of general route, or other acts of that company?

The defendant contends first that the lands in controversy were excepted from the operation of the grant to the State of Oregon by the transmission to the Secretary of the Interior of the Perham map, and if not, that they were excepted by the filing by the Northern Pacific Railroad Co. of the map of the general location of the route of its road on August 13, 1870.

We will discuss the validity and effect of the Perham map hereafter.

It will be remembered that the grant to the State of Oregon was made on February 25, 1867; that the wagon road in aid of which the grant was made was constructed and completed prior to the 23d day of June, 1869; that the Governor of Oregon had, on July 23, 1869, certified that the road had been definitely located and constructed and completed; that the map of the constructed road and the Governor's certificate of its completion had been filed in the Interior Department prior to December 18, 1869; and the lands embraced within the limits of the grant to the State of Oregon had been withdrawn from settlement and sale on that date.

We contend that the title of the State of Oregon and of its grantees was not affected by the filing of the map of general route on August 13, 1870.

First—Because, being a map of general route only, it had no retroactive force; and

Second—Because it did not identify the Northern Pacific Railroad Co.'s grant so that the grant attached to any particular tract of land.

It has been repeatedly held that the effect of filing a map of general route is only to withdraw the lands from *future* disposition. It does not cause the grant to attach to any particular tract of land. The grant still remains a floating grant until a map of definite location is filed. It may be admitted that if the Northern Pacific Railroad Co. had definitely located its road from Wallula to Portland, its grant as to lands within the limits of its grant in place *not excepted from the grant* would have taken effect and its title would have related back to the date of the grant, and the grant would have attached to specific tracts of land.

But in the present case it is alleged in the complaint and not denied by the answer that "the line of the road of said Northern Pacific Railroad Co. between Wallula and Portland, or to a point opposite Portland, was never surveyed, that the said line of said road between the said points was never definitely located or fixed by the said company, that no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department, that said Northern Pacific Railroad Co. never constructed any portion of its said road between said Town of Wallula and said City of Portland."

So that there is no question in these cases about the character of the map filed on the 13th day of August, 1870; and we claim that the right of the wagon road company to the lands in question was not impaired nor the status of the lands affected by that map; that the question therefore to be considered in these cases is not what lands the Northern Pacific Railroad Co. would have acquired, if it had definitely located and constructed its road between Wallula and Portland, but what rights it acquired, if any, by filing a map of general route, and whether the filing of said map segregated any lands from the public domain or prevented them from passing to the Dalles Military Road Co., under the grant to the State of Oregon.

We think this question has been substantially decided by the Supreme Court of the United States in several cases. In Kan. Pac. Ry. Co. v. Dunmeier, 113 U. S. 636, Mr. Justice Miller, in delivering the opinion of the Supreme Court, said:

"The record shows that while the company did not file its line of definite location until about two months after Miller had made his homestead entry, it did designate the general route of said road and file a map thereof in the General Land Office, on July 11 of the same year, 1866, which was fifteen days before the homestead entry."

Again he said, speaking of the rights acquired by the railroad company by filing a map of general route of its road:

"What were those rights? This action does not, like the filing of the line of definite location, vest in the company a right to *any specific piece of land.* It establishes no claim to any particular section with an odd number."

And in United States v. Southern Pacific Ry. Co., 13 Sup. Ct. Rep. 157, 146 U. S. 600-1, Mr. Justice Brewer, in announcing the opinion of the Supreme Court, said:

"A distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of Butts v. R. R. Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100. The act under consideration in that case was that of July 2, 1864, 13 Stat. 365, making a grant to the Northern Pacific Railroad Co."

And again he said:

"The Act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the distinct location of its road, and limits the grant to such alternate sections as have not been reserved, sold, granted or otherwise appropriated, and are free from pre-emption grant or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of adjoining odd sections within forty miles on each side until the definite location is made."

And he further says:

"The map which was filed on April 3, 1871, was simply one of *general route*, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached."

In the case of Kan. Pac. R. R. Co. v. Atlantic R. R. Co., 112 U. S. 422, the court said:

"The line of the road . . . was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant . . . was in no respect

an impairment of its rights. . . . The order of the withdrawal of lands along 'the probable line' of the defendant's road, made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which it would have acquired to the lands, nor in any respect controlled the subsequent grant."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court in the case of St. Paul, etc., Co. v. Greenhalgh, 26 Fed. 565, said:

"The complainant took nothing by the withdrawal. A withdrawal passes no title. It only prevents other titles from accruing."

In the case of the Wis. Cent. R. R. Co. v. Price, 133 U. S. 496-519, the court, in discussing the effect of the filing of a map of general route, at page 509, said:

"The title conferred by the grant was necessarily an imperfect one. Because until the lands were identified *by the definite location* of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, *afloat.*"

And Mr. Justice Brewer, in the case of Sioux City, etc., R. R. Co. v. Griffey, 143 U. S. 32-41, on pages 38-9, said:

"The first and principal question is at what time the title of the company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. . . . . The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the

line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the Government knowledge of its selected line is it concluded by its action. Then, so far as the purposes of the grant are concerned, is its line *definitely fixed;* and it cannot, therefore, without the consent of the Government, change that line so as to affect titles accruing thereunder."

In the case of the United States v. the Southern Pacific Railway Co., 13 Sup. Ct. Rep. 152, 146 U. S. 570, which was a suit concerning lands between the overlapping limits of the grant to the Atlantic & Pacific R. R. Co. and a grant to the Southern Pacific Ry. Co., in which the grant to the Atlantic & Pacific was the prior grant, but the definite location of its road was subsequent to the definite location of the road of the Southern Pacific, and in which grant to the Southern Pacific there had been inserted the following proviso: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Co. or any other railroad company," it was held that, the grant to the Atlantic & Pacific being a prior grant, and the line of its road having been definitely located, its title related back to the date of the grant, and it took the lands within the conflicting limits of the two grants, in preference to the Southern Pacific Co. Mr. Justice Brewer, in announcing the decision of the Supreme Court, said:

"The question is asked, supposing the Atlantic & Pacific Co. had never located its line west of the Colorado river, would not these lands have passed to the Southern Pacific Co., under its grant. *Very likely that may be so.* The lan-

guage of the Southern Pacific Co.'s grant is broad enough to include all lands along its line; but if the grant to the Atlantic & Pacific Co. had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Co."

As the definite location of the line of the road of the Northern Pacific Railroad Co., from Wallula to Portland, was never made, the grant to the Northern Pacific never took effect as to any land alleged to have been granted in aid of the line from Wallula to Portland, and it cannot be affirmed or established as a matter of law or fact that a single section of land was granted to the Northern Pacific for that portion of its road, or at least any particular section, and therefore it cannot be shown that any portion of the lands embraced within the grant to the State of Oregon were ever granted to or reserved for the Northern Pacific Railroad Co.

But this very question as to whether the grant to the Northern Pacific Railroad Co. between Wallula and Portland ever took effect so as to prevent a subsequent grant from attaching to lands embraced with the limits of its grant, as shown by its map of general route, was decided by this court in the case of the Oregon & California Railroad Co., John A. Hurlburt and Thomas L. Evans, appellants, versus the United States of America, appellee.

In that case, Judge Ross, announcing the opinion of the court, said:

"The only thing remaining in the case that could take the lands in controversy out of the mass of public lands to which the grant of 1866 to the Oregon & California Railroad Co. applied is the preceding grant to the North-

ern Pacific Railroad Co. of July 2, 1864, and the Perham map or diagram filed thereunder.

"It is not pretended that any order of withdrawal was made by any officer of the Land Department, based on that map. Was it sufficient, taken in connection with the Act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Co.?

"It was not, for at least two very substantial and obvious reasons. Upon its face, as well as by the letter accompanying it from the President of the Northern Pacific Railroad Co., of date March 6, 1865, it purported to be the designation of the general route of a railroad from a point on Lake Superior, in the State of Wisconsin, via the valley of the Columbia river, to Puget sound, in the State of Washington, which the letter of its President stated the company had adopted as the line of its road.

"That was not the line the Northern Pacific Railroad Co. was authorized by the Act of July 2, 1864, to locate and build. The line authorized by that Act, and in aid of which that grant was made, extended, as has been seen, from a point on Lake Superior, in the State of Minnesota or Wisconsin, westerly, by the most eligible railroad route, on a line north of the 45th degree of latitude, and within the territory of the United States, to some point on Puget sound, *with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon*, leaving the *main trunk* line, at the most suitable place, not more than three hundred miles from its western terminus (13 U. S. Stat. 365; United States v. Northern Pacific Railroad Co., 152 U. S. 284).

"As said by the Supreme Court, in the case just cited:

"Although that act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget sound, which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget sound, and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route to cover an unlimited extent of country, north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad, 139 U. S. 1, 13, 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant."

"The indefiniteness of the Perham map or diagram, which is so manifest on its face, was alluded to by the Supreme Court in the same case (152 U. S. 292), in these words:

"It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Co. in 1865 constituted the reason why that map was not accepted by the Interior Department."

"So it was as has already been shown. The fact that upon its face it did not purport to be anything more than a mere sketch or diagram unauthenticated by any engineer or officer charged with the duty of designating such a route, coupled with the fact that it was not only not accepted, but was rejected, by the Land Department of the Government as insufficient to properly designate the general route of the road the company was by the act of congress authorized to build, constitutes a second reason why the granting act did not itself operate to withdraw the lands in controversy for the benefit of the Northern Pacific Railroad Co. They, therefore, remained public lands to which the subsequent grant to the Oregon & California Railroad Co. might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee Northern Pacific Railroad Co., operated to withdraw the lands in controversy from the mass of public lands. And if these lands, why not all other public lands within the territory of the United States, situated north of the forty-fifth degree of latitude, and between the termini named in the act? It would be difficult to maintain any distinction in this respect between any of the public lands, not min-

eral, situated in the immense belt through and along which the Northern Pacific Railroad Co. might have located and constructed its road.

"The court below, in its opinion, held that

"It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. *It is unimportant that the company never exercised this power.*"

"In holding that it is unimportant that the Northern Pacific Railroad Co. never exercised its right to locate and build its road along and opposite to the lands in controversy, the court below committed its second error.

"It is said that the grant contained in the act, in and of itself, was "an appropriation of the public lands." Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Co. was authorized to locate and build its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant in and of itself operated as an appropriation of any particular public land, it operated as an appropriation of all public lands within the United States, situated north of the forty-fifth degree of latitude and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route, no distinction can be made between any of the public lands, not mineral, situated in the belt

through and along which the Northern Pacific Railroad Co. might have located and constructed its road. Is it possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of United States v. Southern Pacific Railroad Co. (146 U. S. 570), the Supreme Court said that the intent of Congress in all railroad land grants, as has been declared by that court again and again, was that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands. And in respect to this very grant of July 2, 1864, the Supreme Court, in the case of United States v. Northern Pacific Railroad, 152 U. S. 296, in express terms declared that it embraced *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.* As it is not pretended that any such line, in so far as concerns the lands here in controversy, ever was definitely fixed, how that grant, in and of itself, without any designation of the required route, can be held to embrace these lands, we are unable to understand. It requires the act of the grantee to give precision to such grants and to identify by the location of its road the lands embraced by the grant. When that is properly done, the grant attaches thereto and becomes effective as of its date; but until there is some designation of route by the grantee, there is nothing to segregate any particular land from the mass of public

lands, and, manifestly, if such segregation never occurs, those that otherwise might be covered by the grant remain public lands, and subject to any other valid grant that congress may have made embracing them. The grant of July 2, 1864, to the Northern Pacific Railroad Co. never having taken effect, so far as concerns the lands in controversy in this suit, they were public lands at the time of the grant to the Oregon & California Railroad Co., and at the time of the definite location by that company of the road it was authorized to build along and opposite to them, and falling, as they do, within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed, and cause remanded, with directions to the court below to dismiss the bill."

II.

Was not the grant to the State of Oregon made by the act of February 25, 1867, excepted from the grant to the Northern Pacific?

The only exceptions in the grant to the State were of lands theretofore, that is, prior to February 23, 1876, "reserved to the United States or otherwise appropriated by Act of Congress or other competent authority." The grant to the Northern Pacific Railroad Co. was of lands on the line of its road to which the United States should have "full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

The United States expressly reserved the right *to grant* lands at any time prior to the filing of the map of definite

location of the railroad company's line with the Commissioner of the General Land Office, and expressly excepted the lands it *should grant* prior to that time from the railroad company's grant.

We contend that the said grant to the State of Oregon was made in pursuance of and in accordance with this reservation of the right of the United States to grant lands, though they might be found upon the filing of the map of general location of the route of the Northern Pacific Railroad Co.'s road to be embraced within the limits of the grant to that company, and that lands so granted were expressly reserved from the said company's grant.

In cases of conflicting grants to different railroad companies, the Interior Department, prior to 1878, held that the company which first definitely fixed the line of its road acquired title to the land. In the case of Oregon & California R. R. Co., 14 L. D. 188, the Secretary of the Interior says: "Under the rulings in force in this department prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon & California Co. within the conflict now under consideration."

This ruling of the Land Department, which had always prevailed until 1878, was changed immediately after the decision of the Supreme Court in Missouri, Kansas, etc. v. Kansas Pacific, etc., 97 U. S. 492, which was rendered that year.

In that case, the court was construing the third section of the Act of Congress of July 1, 1862, granting lands to the Union Pacific Railroad Co., in these words: "That there

be and is hereby granted to the said company every alternate section to the amount of five alternate sections not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said map is definitely fixed."

In delivering the opinion of the court, Mr. Justice Field says:

"The grant was in the nature of a float, and the reservation excluded only specific tracts to which certain interests had attached before the grant had become definite or which had been specifically withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. *It was not within the language or purpose to except from its operation any portion of the designated lands to aid in the construction of other roads.*"

Afterwards, in delivering the opinion of the court in St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, Justice Field says:

"But independently of this conclusion, we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Co. was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself." (Missouri, Kansas & Texas Railway v. Kansas Pacific Railway, 97 U. S. 491, 498, 499.)

The quotations from these two decisions seem to hold that priority in the definite location of a railroad gave pri-

ority of right to lands within conflicting limits. This reversed the rulings of the Land Department in that respect, which had prevailed until 1878.

In neither of these cases was it necessary for the court in coming to a decision to make these declarations. Both of them were decided upon other grounds and for other reasons. In fact, they seem to be mere *obiter dicta.*

But conceding that the rule here laid down by the Supreme Court is correct so far as it concerns grants to different railroad companies, it does not follow that a grant to the State of Oregon to aid in the construction of The Dalles Military Road shall not have priority of right over the grant to the Northern Pacific Railroad Co.

The Supreme Court says, in 139 U. S. 17, supra:

"We are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Co. was not intended to cover other grants for the construction of roads *of a similar character.*"

But the Northern Pacific Railroad and The Dalles Military road are in no sense roads of a similar character. The former is a road belonging to a private corporation and for its especial benefit. The latter is a public road of the United States, constructed for public uses and especially for the benefit of the United States.

MILITARY ROADS HAVE ALWAYS BEEN CONSTRUCTED AT THE EXPENSE OF THE UNITED STATES, AND ARE IN THE FULLEST SENSE PUBLIC ROADS OF THE UNITED STATES.

An examination of the statutes of the United States will show that for several years preceding the civil war, a number of military roads were constructed at great expense

by the United States within Oregon and Washington Territories.

By Act of Congress of February 17, 1855, (10 Stats. at Large, 608,) $30,000 was appropriated to construct a military road from Astoria to Salem.

On March 2, 1857 (11 Stats. 168), $10,000 additional was appropriated.

On June 2, 1858 (11 Stats. 337), $30,000 additional was appropriated to complete the same.

By act of February 6, 1855, (10 Stats. 603,) $25,000 was appropriated to construct a military road from The Dalles of the Columbia to Columbia Barracks, and $30,000 to construct a military road from Columbia Barracks to Fort Steilacoom, in Washington Territory.

By act of March 3, 1859, (11 Stats. 434,) $100,000 was appropriated to construct a military road from Fort Benton to Walla Walla (known as the Mullan Road).

All these roads, besides others in Oregon and Washington, were constructed under direction of the Secretary of War. They were public and not private roads, and deemed necessary for the protection of the country and to facilitate the movement of troops and munitions of war.

It is matter of history, of which the court will take notice without proof, that in 1862 extensive gold mines were discovered in what is now known as Canyon City, and conflicts were constantly occurring between the miners and Indians in the vicinity. Troops were sent to protect the people who had gone thither. Permanent military camps were established at Camp Watson, Camp Harney and Camp Logan, the former on the trail leading from Dalles City to Canyon City, and the others in the neigh-

borhood of the diggings. There was at the time no road within fifty miles of these military posts, and all supplies had to be transported by pack trains from Dalles City.

Petitions were sent to Congress asking for the construction of a military road from Dalles City to these new diggings, and the result was that Congress passed the act of February 25, 1867, (14 Stats. 409,) granting lands to the State of Oregon to aid in the construction of a military road from Dalles City to Snake river. This is the grant which was subsequently transferred by the State to the Dalles Military Road Co., and a part of which is now in controversy in this suit.

Instead of appropriating the money, Congress appropriated certain sections of land to aid in the construction of this military road, but all the same this was as much of a *public road* as was the Astoria and Salem Military Road before referred to.

Section 2 of the act granting lands to aid in the construction of the Dalles Military road provides that "The said road shall be and remain a *public highway* for the use of the government of the United States, *free from tolls* or other charges upon the transportation of any property, troops or mails of the United States."

The grant to the state was of the odd-numbered sections to the extent of three sections in width on each side of said road. As we have said, the only reservation from the operation of this grant was such land as had heretofore been reserved to the United States or "otherwise appropriated by Act of Congress."

The grant to the Northern Pacific Railroad Co. was a conditional one, and that company had no interest what-

ever in it until the definite location of its road. The land was in no sense *appropriated by Act of Congress.* It was not intended by Congress in making the grant to the Northern Pacific Railroad Co. to withhold any part of these lands from subsequent appropriation, sale or grant, before the line of its road was definitely fixed.

As was said by Mr. Justice Field in Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 498, supra:

"As the sections mentioned could only be known when the route of road was established which might not be for years, the government did not intend to withhold the lands in the meantime from occupation and sale, and thus retard the settlement of the country nor *exclude the lands* for public uses."

The grant of land to the State of Oregon to aid in the construction of the Dalles Military road was for public uses, and is therefore to be liberally construed in favor of the grantee.

III.

If any lands were excepted from the grant to the State on account of the Northern Pacific Railroad Co.'s grant, was such exception of lands in the State of Oregon 10 or 20 sections to the mile?

The grant is of "every alternate section of public land not reserved, designated by odd sections to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and 10 sections of land on each side of said railroad whenever it passes through any state."

We think the intention of Congress to grant to the Northern Pacific Railroad Co. 10 sections of land only on

each side of the road within a State is apparent from the terms of the grant, and that the extent of the grant to that company depends upon the location of the land. By the express terms of the statute, if the road passes through a State the grant is limited to 10 sections to the mile on each side of the road. The words "through the territories of the United States" we think may be read as referring to the grant; but if they refer to the line of the road which the company might adopt, still it may be held, without doing violence to the language employed, that where the line is located in a territory, the grant within a State is limited to 10 sections to the mile.

Congress must have had some reason for making the grant in a territory double that in a State. Lands within a State might fairly, on account of a larger and denser population and older communities and better development of the country, be presumed to be of greater value than lands in a new territory. It was the location of the lands and not the location of the road therefore that must have controlled Congress.

It can hardly be possible that it was the intention of Congress to grant to the company 20 sections of land to the mile within a State if the company should choose to locate its road, as in the present case, within a territory, but immediately along the boundary line between a State and a territory.

A long-established rule of construction of such grants is that they will be construed strictly and not extended by implication beyond their natural import.

United States v. Arrendo, 6 Pet. 699.

Jackson v. Lampshire, 3 Pet. 280-9.

Beatty v. Knowler, 4 Pet. 52.

Charles River Bridge Co. v. Warrer Bridge, 11 Pet. 422.

Griffing v. Giib, 1 McAl. 211.

Grants of land by Act of Congress to aid in the construction of a railroad should be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language.

Dubuque, etc., R. R. Co. v. Litchfield, 23 How. 66-88.

If the construction of the grant to the Northern Pacific Railroad Co. we contend for can be given to the statute it should be adopted by the court.

IV.

Were the lands in question withdrawn by operation of law upon the transmission to the Secretary of the Interior of the Perham map in 1865, so as to except them from the operation of the grant to the State of Oregon made by the act of February 25, 1867?

That the Perham map was not executed in accordance with the requirements of the statute and the regulations of the Department and was not accepted or filed by the Department of the Interior and that no withdrawal of lands on account thereof was made, appears from the correspondence concerning the same, made exhibits to the answer. The Perham map purported to be a map of the main line of the road of the Northern Pacific Railroad Co. from Lake Superior to Puget sound. The act of July 2, 1864, required the main line of said road to be located and constructed upon the most eligible route between those points. As was said by Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United States in

United States v. Northern Pacific R. R. Co., 14 Sup. Ct. Rep. 598, 152 U. S. 284:

"The road should be constructed upon the most practicable line. Any unnecessary deviation from such line would not be deemed within the contemplation of the grantor and would be rejected as not in accordance with the grant."

The decision of the Supreme Court in this case seems conclusive that the Perham map was properly rejected by the Department. In delivering the opinion of the court, Mr. Justice Harlan said:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget sound; and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than 300 miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget sound, the branch line could not have left the main line at some point not more than 300 miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of

latitude. On the contrary, as said in St. Paul & P. R. Co. v. Northern Pac. R. Co., 130 U. S. 1, 13, 11 Sup. Ct. 389, 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.' It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Co. in 1865 constituted the reason why that map was not accepted by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia river and via some point at or near Portland. It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia river, that would strike the main trunk line connecting Puget sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget sound."

In the case at bar it does not appear that the line traced on the Perham map was the most eligible route for the main line of the company's road between Lake Superior and Puget sound.

The question of the validity and effect of the Perham map is thoroughly and ably discussed in the brief of counsel for appellants in the case of the United States of America v. the Oregon & California R. R. Co., John A. Hurlburt and Thomas L. Evans pending in this court, and we take the liberty of incorporating the following portion of their argument applicable to this case in this brief:

"We claim that the lands in suit were in nowise affected by the Perham map, for all of the following reasons:

"(a) It showed two different lines of a road to Puget sound—but did not designate either, even alternately, for a route.

"(b) It did not pretend to designate a route which the company had 'determined' upon or 'fixed.'

"(c) It was not accepted by the United States.

"(d) The Commissioner's rejection is conclusive as to the Northern Pacific Co., because it acquiesced and did not appeal. The United States, having sustained no wrong thereby, could not have complained of its own action at the time, in a direct proceeding—and should not, at this late day, be heard to complain collaterally.

"(e) The Northern Pacific Act did not provide for, nor contemplate, the withdrawal of any land from liability to subsequent *grant*, made before definite location.

"(a) The first section of the act of 1864 authorized the Northern Pacific Co. to construct its *main road* 'by the most eligible railroad route' north of the forty-fifth degree of latitude, from Lake Superior to Puget sound, and also to construct a branch road down the valley of the Columbia river to a point near Portland.

"The Perham map shows several different lines, without

even expressing a preference between them. Two routes, starting at different points on Lake Superior, are brought together in Montana, at the point marked 'A' on the map. One of those lines is marked 'a practicable railroad as surveyed by Governor Stevens,' and the other as 'worthy an examination for a railroad route.'

"From 'K,' in Washington, a line extends northwest to 'H,' on Puget sound—and another line is drawn from 'K' southwesterly along the course of the Columbia river to Vancouver, thence north to the point 'H,' on Puget sound.

"The Northern Pacific Co. did not by this, nor by any map filed prior to the joint resolution of 1870, offer to designate a route for the *branch-line road.* It wanted to build a road which would connect Portland, Puget sound and Lake Superior; but had no authority to extend its branch line beyond Portland, and the act of 1864 terminated the main line at Puget sound. Had the company been assured that, by waiving the branch-line provisions, the main-line road could be built down the Columbia river to Portland, thence to Puget sound, it may be that it would have adopted the Columbia river line; but it is apparent that the company could not make a map committing itself to the adoption of a fixed line for either the branch or main road, as such, without thereby illustrating that it had no authority to build a road from Portland to Puget sound. The act fixed the terminus of the main road at Puget sound, and the terminus of the branch at a point near Portland, and when either road reached the prescribed terminus it must stop there; and the theory out of which the Perham map evidently arose, was that the company might, by waiving its *branch-line* authority, build its *main line* to Puget sound by way of Portland.

"It was for these reasons, we believe, that the Perham map made equivocal and alternative designations of route.

"It is contended . . . that the Perham map made a valid designation from 'K' to Vancouver of the *branch-line* road, notwithstanding it was made and filed as a general route map of the *main-line* road to Puget sound by way of Vancouver; because the same company, at that time, had the right to make and file a general route map, designating for its branch road the identical route from 'K' to Vancouver, shown on this map. The vice of such contention, it seems to us, arises out of contemplating the privileges and rights conferred as a unit of grant—because the beneficiary thereof is the same corporation.

"Suppose the act had authorized the Northern Pacific Co. to construct a road by the most eligible route, from Lake Superior to Puget sound; and another company to construct a branch road from 'K' to Portland. It certainly could not be claimed that such other company would be bound by, or entitled to any benefits from, the Northern Pacific's designation of a line of route from 'K' to Puget sound by way of Portland; nor that the Northern Pacific could designate such a route at all. While the fact that in one instance the Northern Pacific Co. was, and in the other was not, the beneficiary of the two grants, would make a difference in considering the quantity of grant made to that company—it should not make any difference in considering the grants themselves, as such.

"Nothing is claimed here by or for the Northern Pacific Co. The question here is as to whether the filing of the Perham map, showing a line for the *main road* along an unauthorized route, constituted a designation of the

branch-line road, in so far as the branch-line road *might have been*, but was not, mapped for such route.

"(b) The first section of the act of 1864 authorized the construction of a railroad along a line 'to be *determined* by said company.' Section 3 describes the lands granted in relation to such railroad line 'as said company may *adopt;*' and Section 6 provides what shall be done 'after the general route be *fixed.*'

"In the case of Hayes v. Parker et al., 2 L. D., p. 555, considering the provisions of these sections, Secretary Teller said:

" 'The act in question provides for but one line of general route, and one of definite location. It is certainly a very grave question whether legislative withdrawal operates under any preliminary map other than the one which the company *finally determines* shall be the settled and *fixed* general route of the road. If legislative withdrawals operate upon preliminary lines not finally fixed as lines of general route, then we have in this instance a legislative withdrawal of a section of country almost entirely different from that which was finally included in the lines of the general route.'

"It will be remembered that the Perham map was rejected, and no executive withdrawal of any land was made in pursuance of it. But had it been accepted by the Land Department, who might say what lands it operated to withdraw—those along the direct line from 'K' to 'H,' or those along the line whih followed the Columbia river to Vancouver, thence to 'H'? As a matter of fact, the road was not built along either of those lines.

"(c) No executive withdrawal was made in pursuance

of the Perham map; and we claim that the Perham map did not operate a legislative withdrawal—because, among other reasons, it was not *accepted* by officers of the United States.

"We know of no case, the decision of which depended solely upon the Land Officers' acceptance or rejection of a railroad map. It seems to have been treated as a *matter of course*, throughout the decisions relating to the public lands, that there can be no pre-emption, homestead, or other claim under the laws relating to the public lands, without the co-operation of the Land Department; and, in the same way, it has been frequently said, in effect, that acceptance of the Land Officers is essential to the efficacy of railroad maps.

"The grant made by the act of July 23, 1866, to the St. Joseph & Denver City Railroad Co., contained no specific requirement that the company file a map of definite location. The language of the act is:

" 'That there be hereby granted . . . every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of said road is definitely fixed, sold,' etc.

"Construing this grant, Mr. Justice Field said:

" 'Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior,

and *accepted* by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.' (Van Wyck v. Knevals, 160 U. S. 366.)

"Secretary Smith, in the case of Cole v. N. P. R. R. Co., 17 L. D. 9, construing Section 6 of the Northern Pacific Act, held:

" 'Said section provided for a legislative withdrawal of lands within the granted limits, upon the filing of a map of general route, which became operative upon the *approval* of the map.'

"Substantially the same language is used by Assistant Attorney-General Smith, in his opinion to Secretary Delano, reported at page 377, Copp's Pub. Land Laws (1875 Ed.) in which Secretary Delano concurred (p. 380).

"In the case of Buttz v. N. P. R. R. Co., 119 U. S., at page 71, Mr. Justice Field said:

" 'The Act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the definite location of the line of its road; . . . but it also contemplates a preliminary designation of the general route of the road. . . . The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line.'

"(d) Section 2273 of the United States Revised Statutes provides that:

" 'Appeals from the decision of the district officers, in

cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.'

"This section was taken from the act of June 12, 1858, and was very soon after adopted as a rule of practice in respect of all decisions rendered by the Commissioner. Rule 112 of the 'Rules of Practice' provides that:

"'Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.' (IV. L. D. 49.)

"No appeal was taken for the Northern Pacific Co. from the Commissioner's rejection of the Perham map.

* * * * * * * * * *

"In the case of the *United States v. Marshall Mining Co., 129 U. S.*, at page 587, Mr. Justice Miller, in delivering the opinion, said:

"'They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.

"'It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the *right to appeal* to the Commissioner of the General Land Office from the order of the register and receiver dismissing their application. This was not done, and it never has been done.

* * * *

"'All the errors and irregularities which occur in the process of entering and procuring title to the public lands

of the United States ought to be corrected within the land department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party can not be permitted to remain silent for more than eight years after he has abandoned a contest, submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the land office.'

"It may be safely said that the Northern Pacific Co. could not now maintain a suit, in a court of equity, which depended upon its establishing the validity of the Perham map; and yet, as between the United States and that company, the company, and not the United States, was injured—if any wrong was done by the Commissioner's rejection of the Perham map.

"The Northern Pacific Co. asked approval of the Perham map, and that lands of the United States along the lines shown on it be withdrawn. The United States, by the Commissioner, acting without fraud, rejected the map and refused the the withdrawal. If any wrong was done it was *by* the United States, and *against* the company. The company might have complained, but did not; but the Courts were at all times closed against the United States, for it had *no wrong to redress.*

* * * * * * * * * *

"(e) Nearly all of the railroad land grants provide that there shall be a withdrawal of lands, when a map of gen-

eral route is filed; but the Northern Pacific's Act does not. The words of Section 6, 'and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption,' relied upon as operating a withdrawal, are words of *exclusion* from sale, entry and pre-emption; and are not equivalent to a statutory *withdrawal* from market.

"In the case of *Kan. Pac. Co. v. Dunmeyer, 113 U. S., 629-644*, the decision depended upon whether the land in suit was withdrawn from *homestead entry* by a railroad grant, which provided a withdrawal of lands, upon general route designation, from 'sale' only. It was held (at p. 638);

" 'This act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from "*sale*" by order of the Secretary of the Interior. The lands, therefore, were to be reserved from *sale only*, and not from pre-emption or homestead claims.'

"An analysis of the act of 1864, considered in view of the Joint Resolution of 1870, makes it evident, beyond the plain meaning of the words employed, that Congress did not intend that any lands should be reserved from such subsequent *grant* as it might see fit to make, prior to definite location of the Northern Pacific grant.

* * * * * * * * * *

"All lands 'granted' prior to definite location are excepted—and it is provided that the company shall have other lands in lieu of those 'granted.' Section 6 provides that the lands shall not be subject to 'sale, or entry or pre-emption'; but does not exclude them from subsequent *grant.* * * * *

"Notwithstanding the lands were withdrawn upon general route designation from pre-emption, entry and sale,

persons who settled upon such lands prior to the withdrawal might thereafter pre-empt, enter and purchase the same—but the withdrawal reserved the land from liability to pre-emption, entry or sale, founded upon settlement initiated after withdrawal. And so it was the act provided that the company should have other lands for such as were pre-empted, entered or sold prior to definite location. But the act also provided that the company should take other lands for such as were 'granted' or 'reserved' prior to definite location.

"If, upon general route designation, the lands were withdrawn from the power of Congress to grant them to, or reserve them for, another company, then what did the act mean by saying that the company shall take other lands for those *granted* or *reserved* prior to definite location?"

V.

It is alleged in the complaint that at and before the time the defendant settled upon the said tract of land and made claim thereto and made application to purchase the same, he, the said defendant, well knew that the said lands were within the limits of the grant of lands in place to said Dalles Military Road Co. and of the claim of its successors and assigns to said grant, and that if it had been true that the lands were a part of the grant made to the Northern Pacific Railroad Co. and were not granted to the State of Oregon, the complainant being a bona fide purchaser of said lands would have had a preference right to apply for purchase of lands so patented to the defendant under the provisions of section 5 of the Act of Congress entitled "An Act to provide for the adjustment of land grants made by

Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, but that complainant received no notice and had no notice or knowledge of the application of the said defendant to purchase said land, and no opportunity to apply to purchase the same under the provisions of said section 5, or otherwise.

The Supreme Court of the United States, in the case of the United States v. The Dalles Military Road Co. et al., 148 U. S. 49, held that the purchasers from said company were bona fide purchasers and that their title was beyond challenge. That suit was instituted to annul the grant of lands made to the State of Oregon and set aside patents which had been executed to the grantees of the State.

It has been decided in several cases by the Commissioner of the General Land Office that the complainant, the Eastern Oregon Land Co., being a bona fide purchaser of the wagon-road grant, was entitled to a preference right to purchase lands within the limits of the grant to the State of Oregon and the overlapping limits of the two grants under the provisions of section 5 of the act of March 3, 1887.

It follows that the company was entitled to notice of the application of the defendant to purchase the land in question and to have an opportunity to make application to purchase the land under said act. But the proceedings by which the defendant obtained his patent were *ex parte* and the complainant having no notice of the same had no opportunity to make such an application.

To avoid this conclusion, the defendant attempts to show that the complainant was not a bona fide purchaser

of the land in question, not by denying the allegation that the complainant had no actual or constructive notice that the lands were claimed by the Northern Pacific Railroad Co. or by the United States to be within its grant and excepted from the grant to the State, but by alleging that the complainant is chargeable with constructive notice of the grant to the Northern Pacific Railroad Co. and the construction placed upon said grant to the Northern Pacific Railroad Co. and the proceedings of the Northern Pacific Railroad Co. thereunder and the construction later placed by the Department of the Interior upon the act.

Such constructive notice, if any, as the law imputed to the complainant of the grant to the Northern Pacific Railroad Co. did not prevent the complainant from being a bona fide purchaser within the meaning of the act of March 3, 1887. This question was decided by Judge Ross, in the case of the United States v. Southern Pacific Ry. Co., in his opinion, filed July 27, 1896.

In that case Judge Ross, in announcing the decision of the court, said:

"It is suggested on the part of the complainant that the defendant Wright cannot be regarded as a purchaser in good faith, because he took with notice of the grant to the railroad company and subject to all of its terms and provisions. It is undoubtedly true that he did take with notice of that grant, and subject to all of its terms and conditions. He must be held to have known, for example, that the officers of the Land Department charged with the duty of executing the provisions of that grant were not empowered to issue thereunder any evidence of title to any land that at the time of the taking effect of the grant had been other-

wise disposed of by the Government, or the disposition of which had been committed to others than the officers of that Department. In all such cases in which there is a total lack of jurisdiction over the subject matter, any pretended conveyance thereof by the officers of the Land Department, even if in the form of a patent, would be void in the hands of whomsoever it should come. But where, as in the case at bar, jurisdiction over the subject matter was committed to the officers of the Land Department, and they were charged with the duty of determining the question whether the particular land was or was not covered by the grant to the railroad company, such a decision culminating in the issuance of a patent passes title to the property and is subject only to annulment on a direct attack and for sufficient reasons. (United States v. Winona & St. Paul Railroad Co., 15 C. C. A., p. 96, and cases there cited.) Under well-settled principles of equity, a *bona fide* purchaser under such a patent prior to any attempt to annul it would be protected. (United States v. Winona & St. Paul Railroad Co., *supra;* United States v. California etc., Land Co., 148 U. S. 40-45.)

"Moreover, the act itself in relation to the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, under which the present suit was instituted, declares, in effect, in its fourth section, that those citizens of the United States, or persons who have declared their intention to become such citizens, who have purchased from a grantee company in the honest belief that they were thereby acquiring title, are purchasers in good faith within the meaning of the act; for the provision is that as to all such

lands as are here involved which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons *so purchasing* in good faith, his heirs or assigns, shall be entitled to the lands so purchased,' etc. In the legislation in question, Congress, being aware of the fact that public lands had been erroneously certified and patented to various railroad and other companies, provided for the bringing of appropriate suits to annul 'such' certificates and patents, at the same time affording protection to such citizens of the United States and persons who have declared their intention to become such, their heirs and assigns, as have purchased from such grantee companies in good faith; that is to say, in the honest belief that by such purchase they were obtaining title."

In the United States v. Des Moines Nav. & Ry. Co. et al., 142 U. S. 510, Congress had granted to the Territory of Iowa to aid in the improvement of the Des Moines river alternate sections of public land lying within a five-mile strip on each side of said river, and the state accepted the grant. There was question as to whether the grant extended to the state boundaries or only to Racoon Fork, the head of the improvement. The state entered into an agreement with the defendant, the Des Moines Nav. & Ry. Co., to make the contemplated improvement, and after the work was commenced, the State, by an act of the legislature, offered to convey to the company certain lands including some above Racoon Fork in settlement of the contract. The offer was accepted by the defendant and carried out. Subsequently the act was construed and judicially declared to extend no further than Racoon Fork. If

the theory of the defendant is correct, the company had constructive notice that the grant extended only to Racoon Fork. Subsequently, Congress, by joint resolution of March 6, 1861, relinquished to the State all lands above Racoon Fork which had been improperly certified as a part of such grant, "and," in the language of the statute, "which is now held by bona fide purchasers under the State of Iowa." It was held that the company defendant, the Des Moines Nav. & Ry. Co., was a bona fide purchaser within the meaning of the resolution, and that the lands in question passed *co instante* to the state to the extent of the State's grant to the defendant and immediately vested in the defendant. Mr. Justice Brewer, in announcing the opinion of the court, said:

"Was the Navigation Company a bona fide purchaser under the state? Of course it was. The other defendants who held under it also were. It is claimed by the appellants that the bona fide purchasers referred to were certain parties who had bought portions of these lands from the State of Iowa, paying cash therefor, for the purpose of making improvements, and who had taken possession thereof and were then occupying the same. But the term bona fide purchasers has a well-settled meaning in law. It does not require settlement or occupation. Any one is a bona fide purchaser who buys in good faith and pays value."

In United States v. Winona & St. P. R. R. Co., 67 Fed. 948, it was held that "in a suit in equity brought by the United States under the act of March 3, 1887 (24 Stat. 556), to cancel such certificates (certificates certifying lands to the State of Minnesota under a railroad grant) and to

restore the title of the land to the United States, the equities of bona fide purchasers who hold the legal title under the certificates are superior to those of the United States and constitute a good defense to the suit"; that "such purchasers who hold the legal title are indispensable parties to a suit in equity to annul that title"; and it was held that the purchasers of lands so certified were bona fide purchasers.

See also United States v. Union Pacific Ry. Co., 69 Fed. 974.

Union Pacific Ry. Co. v. United States, 69 Fed. 975.

United States v. C. & O. Land Co., 148 U. S. 41.

United States v. Wenz, 34 Fed. 154.

United States v. Burlington & M. R. Co., 98 U. S. 334-342.

In this last-mentioned case, Mr. Justice Field, in delivering the opinion of the court, declared that the Government "certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees."

Under these authorities the complainant and its immediate grantors must be held to have been bona fide purchasers of the lands in question and as such to have been entitled to a preference right to purchase the lands under Section 5 of the act of March 3, 1887, and to have been entitled to notice of the application of the defendant to purchase the lands and to have an opportunity to apply to purchase the same under said act.

DOLPH, NIXON & DOLPH,
and JAMES K. KELLY,
Attorneys for Appellant.

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY,
Appellant,

vs.

E. I. MESSINGER,
Appellee,

AND

THE EASTERN OREGON LAND COMPANY,
Appellant,

vs.

JOHN D. WILCOX,
Appellee.

Appeal from the Circuit Court of the United States for the District of Oregon.

Appellees' Brief.

J. L. STORY, and
GEARIN, SILVESTONE & BRODIE,
Attorneys for Appellees.

PORTLAND, OREGON:
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1897.

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These are appeals from decrees of the Circuit Court of the United States for the District of Oregon, of date of January 5, 1897, (Transcript of Record, p. 77,) which decrees dismissed complainant's bills. The suits in the Circuit Court were to procure a cancellation of two United States patents, —one to appellee Messinger and one to appellee Wilcox,— for certain lands described in the bills.

It is alleged in both bills of complaint that the lands embraced in these patents lie within the limits of the lands granted to the State of Oregon by act of Congress of February 25, 1867, for the construction of a wagon road from Dalles City, on the Columbia River, to a point on Snake River, opposite Fort Boise, in Idaho Territory.

That on October 20th, 1868, the legislature of the State of Oregon granted to the Dalles Military Road Company all lands, rights of way, rights and privileges pledged to the State of Oregon by said act of Congress, and designated the Dalles Military Road Company as the company to receive said grant. That prior to June 23rd, 1869, the Dalles Military Road Company surveyed and definitely located the line of its wagon road between the points and upon the route designated in said act of Congress and in said act of the legislative assembly of the State of Oregon, and completed said road, and the same was approved and accepted by the governor of the State of Oregon.

That The Dalles Military Road Company, on the 31st day of May, 1876, sold said land grant to Edward Martin, and that the complainant, the Eastern Oregon Land Company, by mesne conveyances became the purchaser of said land grant from Edward Martin.

These facts are all admitted in the answers. But it is alleged by appellee that at the time of the passage of the act of Congress on the 25th day of February, 1867, the lands in dispute were not public lands subject to grant by Congress, inasmuch as they had prior to that time, to-wit, on the 2nd day of July, 1864, been granted to the Northern Pacific Railroad Company, and that therefore as to these lands The Dalles Military Road Company took nothing by the act of

Congress of February 25th, 1867, or act of the Legislative Assembly of the State of Oregon of October 20th, 1868.

It is admitted by the complainant that in the case of the Company against Messinger the land in controversy is situated within twenty miles of the line of the Northern Pacific Company's railroad as designated on the map of the general route of said road, filed by said company August 13th, 1870; and that in the case against Wilcox the land is situated more than twenty miles and less than forty miles from said line.

After the passage of the act of Congress of September 29, 1890, entitled, "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," a large body of land, including the land in dispute, was thrown open to settlement, and on the 28th day of September, 1894, the United States sold to John D. Wilcox the land claimed by him, and on that day executed to him a patent therefor, and on the ... day of ...., 1894, sold to E. T. Messenger the land claimed by him and executed to him a patent for the same.

The Circuit Court held that the lands in controversy, being within forty miles of the line of the Northern Pacific Railroad Company's road, as shown upon its map of general route, were not public lands subject to grant by Congress February 25, 1867, and that consequently neither the State of Oregon nor The Dalles Military Road Company took any title to or interest in said lands by said act, and dismissed complainant's bills. From such holding these appeals are taken.

The legislation referred to in the bill and neccessay to be considered in this case is as follows:

Congress passed and the President approved, on July 2, 1864, an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route." (13 U. S. Statutes, p. 365).

The portions of said act material to be considered herein are:

Sec. 3. And be it further enacted: *that there be and hereby is granted* to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, *through the territories of the United States*, and ten alternate sections of land per mile, on each side of said railroad *whenever it passes through any State*, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions or otherwise claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office: And whenever prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in

lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections, nearest to the line of said road may be selected as above provided: And provided further, That the word 'mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, That no money shall be drawn from the treasury of the United States to aid in the construction of the said Northern Pacific Railroad."

Sec. 4. And be it further enacted: That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in

all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company *confirming to said company the right and title of said lands*, situated opposite to, and coterminus with said completed section of said road, and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of road is completed as aforesaid; provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota until the whole of said railroad shall be finished and in good running order as a first class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota.

* * * * * *

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; (b) and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, shall be, and

the same *are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.* And the reserved alternate sections shall not be sold by the Government at a price less than *two dollars and fifty cents per acre when offered for sale.*

Sec. 8. And be it further enacted, That each and every grant, right and privilege herein, are so made and given to and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, Anno Domini 1876.

Sec. 9. And be it further enacted that the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same upon the further condition, that if the said company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then in such case, at any time thereafter, the United States by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

On April 10, 1869, the following joint resolution was adopted. (16 Stat. U. S., p. 57):

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions; and said Company in respect thereto, being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional or amendatory thereof, provided that said company shall not be entitled to any subsidy in money, bonds or additional lands of the United States, in respect to such extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension, as it may be located; and provided further that at least twenty-five miles of said extension shall be constructed before the 2d day of July, 1871, and forty miles per year thereafter until the whole of said extension shall be completed."

On May 31, 1870, Congress adopted the following joint resolution. (16 U. S. Stat., p.378):

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on the property and rights of property of all kinds and de-

scriptions, real, personal and mixed, including its franchises as a corporation; and as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; also to locate and construct under the supervisions and with the privileges, grants and duties provided for in this act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land belonging to the United States, and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch except mineral, and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, subsequent to the passage of the act of July 2, 1864, and that twenty-five miles of said main line between its western terminus and the City of Portland, in the State of Oregon, shall be completed by the 1st day of January, A. D. 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points, etc."

On February 25, 1867, Congress passed and the President approved "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River."

Section 1 of said act is as follows:

"That there be and hereby is granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road; provided, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses. And provided further, That any and all lands heretofore reserved to the United States or otherwise appropriated by act of Congress or other competent authority, be and the same are hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same in which case the right of way to the width of one hundred feet is granted. And provided further, That the grant hereby made shall not embrace any mineral lands of the United States."

On September 29, 1890, Congress passed and the President approved an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." (26 U. S. Statutes, p. 496):

The following sections of said act are material in this case:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there is hereby forfeited to the United States, *and the United States hereby resumes the title thereto*, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminus with the portion of any railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; Provided, That this act shall not be construed as forfeiting the rights of way or station grounds of any railroad company heretofore granted.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven (27), in township seven (7) north, of range thirty-seven (37) east of the Willamette Meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July 1, 1885, or who at said date were in possession of any portion of said lands, or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to

the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the City of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8, 1885, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the Legislative Assembly of the State of Oregon, approved November 25, 1885, providing for the means to supply the City of Portland with an abundance of good, pure and wholesome water over and across the following described tracts of land: Sections nineteen (19) and thirty-one (31), in township one (1) south, of range six (6) east; sections twenty-five (25), thirty-one (31), thirty-three (33) and thirty-five (35), in township one (1) south, of range five (5) east; sections three (3) and five (5), in township two (2) south, of range five east; section one (1), in township two (2) south, of range four (4) east; sections twenty-three (23), twenty-five (25) and thirty-five (35), in township one (1) south, of range four (4) east, of the Willamette Meridian, in the State of Oregon, *forfeited by this act* are hereby confirmed unto the said City of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections, for the purpose of constructing, maintaining and repairing a water-pipe line aforesaid.

Sec. 6. *That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any state or corporation to which lands may have been granted by Congress, except as herein otherwise provided;* nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to an uncompleted road,and hereby forfeited,within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

The Northern Pacific Railroad Company filed two maps of its road relating to these lands.

First—The map of March 6, 1865: "The Perham map, Exhibit "B." The letter of Josiah Perham, president of the Northern Pacific Railroad Company accompanying this map, together with the letter from the Secretary of the Interior, transmitting the same to the Commisioner of the General Land Office, and the Commissioner's reply, are to be found on pp. 64 to 72, Transcript of Record herein.

Second—The map of August 13, 1870, pleaded in complainant's bill, pp. 22 and 23, Abstract Record.

ARGUMENT.

It is urged in the brief filed by appellant in this case that appellant in any view of the matter, was entitled to "notice" under the provisions of Section 5 of the act of Congress, entitled "An Act to provide for the adjustment of land grants made by Congress *to aid in the construction of railroads*, and for the forfeiture of unearned lands, and for other purposes," approved March 3d, 1887.

But this position is not correct. That was a piece of legislation referring exclusively to land grants *to aid in the construction of railroads*. It is so liminted in the title. Sections one (1) and two (2) of the act are as follows:

"Section 1. That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust in accordance with the decisions of the Supreme Court *each of the railroad land grants* made by Congress to aid in the construction of railroads, and heretofore unadjusted.

"Section 2. That if it shall appear upon completion of such adjustments respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, *to aid in the construction of a railroad* it shall be the duty of the Secretary, &c."

Section five of this act, relied upon by appellant, provides for innocent purchasers from the railroad company. But there are no innocent purchasers from any railroad company in this case.

It is the uniform holding in the Department of Justice

that this act applies only to railroad land grants. In the Department of the Interior also this construction of the act obtains.

In the contest of Rufus H. King vs. The Eastern Oregon Land Company, the Department of the Interior made the following decision December 26th, 1896:

Department of the Interior,

Washington, D. C., December 26, 1896.

Rufus H. King,

vs.

The Eastern Oregon Land Company.

Railroad Land Act of March 3, 1887.

The Commissioner of the General Land Office:

Sir—The land in this controversy is the southeast quarter of section 27, township 2 south, of range 16 east, The Dalles Land District, Oregon, and is within the limits of that portion of the grant made by the act of July 2, 1864, (13 Stat., 356,) to the Northern Pacific Railroad Company, which was forfeited by act of September 29, 1890, (26 Stat., 496,) as well as within the limits of the grant made by the act of February 25, 1867, (14 Stat., 409,) to aid in the construction of The Dalles Military Road.

The grant to the Northern Pacific Road being prior, defeated the grant to The Dalles Road, to the extent of the overlap, and your office included the unpatented lands in said limits in the restoration of the forfeited lands of the Northern Pacific Railroad. Under this restoration Rufus H. King made homestead entry No. 4922 of said land, on October 1, 1893, and made proof on the day appointed there-

for. The Eastern Oregon Land Company filed a protest against the admission of such proof, claiming a prior right, as a purchaser from The Dalles Military Road Company, and by reason thereof, the preference right to purchase said land, under the act of March 3, 1887, (24 Stat., 556).

The entryman made proof, and evidence was submitted by the protestant in support of its claim. On July 20th, 1895, the local office decided in favor of the entryman.

The Company appealed. Your office on April 23, 1896, reversed the decision of the local officers and sustained the company's protest.

The entryman appeals to the Department. The question arises: Does the act of Congress of March 3, 1887, supra, entitled, "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned land, and for other purposes," extend to lands granted to the State of Oregon, to aid in the construction of wagon-roads in said State?

It is a rule of construction that remedial statutes are to be liberally constructed so as to suppress the mischief and advance the remedy. But this rule is only applicable when the words of the statute will admit of its application.

When they are plain and clearly define its scope and limit, construction cannot extend it. "If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreaing it."

Southerland on Statutory Construction, p. 430, p. 556.

The statute under consideration is plain, precise and un-

ambiguous, and, by its terms, only applies to grants of land to railroads.

It has recently been held by the Department that said act "relates specifically to the adjustment of railroad grants," and that it does not apply to a suit instituted for the recovery of title to lands certified on account of a wagon road grant in the State of Oregon.

California and Oregon Land Company, 22 L. D., 170.

I am therefore of the opinion that the decision of the register and receiver, recommending that King's entry be approved for patent and the company's protest dismissed, should be affirmed.

Your office decision is reversed, and the papers are herewith returned.

Very respectfully,

DAVID R. FRANCIS,

Secretary.

See also Secretary's Decisions in

16 Land Decisions, pp. 459-461.

17 Land Decisions, pp. 432-437.

LATERAL LIMITS OF THE GRANT.

It is claimed in counsel's brief that the grant to the Nor-

thern Pacific Railroad Company in no event could exceed twenty miles from the line of the road in a State; and this without regard to whether the line of the road was in the State or in an adjoining Territory. This is not the language of the act, and is not the construction put upon it by the Land Department or the Courts.

The act of July 2nd, 1864, reads, "to the amount of twenty alternate sections per mile on each side of said railroad line as said Company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State."

In the case of Denny vs. Dodson, 32 Federal Rep., p. 910, Judge Deady, having this same grant to the Northern Pacific Railroad before him for consideration, says:

"But independently of this consideration, there does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a Territory or in a State. If in the former, the grant has twice the extent that it has when located in the latter. It is the place of location which determines this matter. The nearness of the line to any other Territory or State has nothing to do with it. Such an understanding has been the uniform ruling of the Department and that mode of determining the lateral extent of the grant is the only practicable one."

In construing grants by the Government of this nature the rule is settled that as between the Government and the grantee company the construction will be against the grantee. In R. R. Co. vs. Litchfield, 23 How., 66, the Supreme Court says:

"All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands upon the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied."

This language is quoted and approved in Leavenworth R. R. Co. vs. U. S., 92 U. S., 733, and the Court there adds:

"And if a right be asserted against the Government it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly or by necessary implication is withheld."

PUBLIC LANDS.

The grant to the State of Oregon of February 25, 1867, is "alternate sections of public land."

It is clear that if the lands, title to which is involved in this controversy, were not "public lands" on February 25, 1867, they did not pass to the State under the act.

The Supreme Court of the United States has in every case where the question was presented to it as to what were "*public lands*" within the meaning of railroad land grant acts, decided that this term did not include lands reserved

for any purpose or in any manner or to which a claim of any kind whatever had attached.

In Wilcox vs. Jackson, 13 Peters, 498, 513, the Court said:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation was made of it."

In Leavenworth R. R. Co. vs. United States, 92 U. S., 733, the Supreme Court quotes this portion of the opinion in Wilcox vs. Jackson, and adds:

"It may be said that it was not necessary for the Court in deciding the case to pass upon this question, but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. * * * * * "Every tract set apart for some special use is reserved to the Government, to enable it to enforce that use. And there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the Government to see that neither class of reservations is deviated from the uses to which it is assigned."

In Newhall vs. Sanger, 92 U. S., 761, the question again came up and the Court said:

"The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present

term, in Leavenworth, Lawrence & Galveston R. R. Co. vs. U. S., (Ante, 634).

"We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could, on the location of the road, the order withdrawing lands from pre-emption, private entry and sale, apply."

In Kansas City Ry. Co., Dunmeyer 113, U. S., 629, the Court held that a homestead entry having attached previous to the grant to the railroad company took the lands out of the grant, although the entryman abandoned his claim."

Mr. Justice Miller, delivering the opinion, said:

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

"We are unable to perceive the force of this proposition."

* * * * * *

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes which have been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands have been otherwise disposed of, their reversion to the government brought them within the grant."

* * * * * *

"Of all the words in the English language this word attached was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Mr. Justice Field dissented in the Leavenworth case ,92

U. S., 733, supra, but subsequently in Bardon vs. The Northern Pacific Railroad Company, 145 U. S., 535, he wrote the opinion of the Court, and says:

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the Court in the Leavenworth case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

* * * * * *

"Land to which any claim or right of others has attached does not fall within the designation of public land."

R. R. Co. vs. Whitney, 132 U. S., 357.

R. R. Co. vs. Alling, 99 U. S., 463.

Van Wyck vs. Knevals, 106 U. S., 360.

Desert Salt Co. vs. Tarpey, 142 U. S., 241.

N. P. R. R. Co. vs. Sanders, 49 Fed. Rep., 132-3.

U. S. vs. N. P. R. R. Co., 41 Fed. Rep., 845.

Denny vs. Dodson, 32 Fed. Rep., 903.

Upon this point we particularly call the Court's attention to the language of the Supreme Court in the case of the United States vs. Northern Pacific Railroad Company, 152 U. S., 284.

In that case the Court had this Northern Pacific grant before it—the grant by the joint resolution of May 31, 1870, insofar as the same affected lands between Portland and Tacoma.

The lands in dispute in that case had been granted to the Oregon Central Railroad Co., May 4th, 1870. This grant was forfeited January 31, 1885. The lands were also included in the grant to the Northern Pacific Railroad Company by the resolution May 31, 1870. The Northern Pacific Company claimed that by reason of the forfeiture of the grant to the O. & C. these lands went to them. But the Court held otherwise, and said. (Page 298-9):

"So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly one month, attached, as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location the lands in question *had been disposed of by the United States* prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, *they were not public lands* within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were, consequently, excepted out of that grant as having been *previously* disposed of by the United States.

When, therefore, Congress by the act of 1885, forfeited to the United States and restored to the public domain so much of the lands granted by act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, *the United States was reinvested with the title for its own benefit exclusively.* And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870."

This decision is directly in point. If the lands in that case "were not public lands within the meaning of the grant of May 31, 1870," because they "had been disposed of by the United States" by act of May 4, 1870, certainly the lands involved in this controversy "were not public lands within the meaning of the" act of February 25, 1867, because they "had been disposed of by the United States," by the act of July 2, 1864.

As to these lands, therefore, the State of Oregon took nothing by its grant of February 25, 1867, and the patents described in the bill should not be cancelled.

U. S. vs. Stone, 2 Wallace, 525.

The grant to the Northern Pacific Railroad Company was by the act of July 2, 1864, and not by the Joint Resolution of May 31, 1870.

It has been claimed that, as to lands on the "branch"

from Wallula to Portland, there was no grant of lands until the passage of the joint resolution of May 31, 1870.

It will be observed that in section three of the act of July 2, 1864,—the section which makes the grant—the words "main line," or "branch," do not occur. There is no qualification to the grant as applying to the "main line" only. It is claimed now that designating one portion of the road "Main Line" confers upon that portion greater rights than are to be accorded to the "branch." This contention is not sound. The term "Main Line" is not a distinction, but a description merely. It is used in the first section of the act. The line from Lake Superior to Puget Sound is called the main line, and the line running down from the main line to Portland is called the branch. These lines were so designated presumably on account of their relative length. The terms "long line" and "short line" would have answered the purpose equally as well. Why the terms "main line" and "branch" were chosen it is unnecessary to consider, except to say that they are appropriate. No change was made up to the passing of the joint resolution of May 31, 1870. Up to that time the building of the road had not progressed. No power was given by the act of 1864 to *mortgage the land grants*. It was found that without such power funds could not be obtained to carry on the work. Hence the resolution of May 31, 1870. The joint resolution of April 10, 1869, was a useless piece of legislation, and the company did not act under it, because while it authorized the extension of the branch from Portland to the Sound, it made no land grant for such extension and gave no right to mortgage anything but the right of way, roadbed and telegraph line, which power was given by the act of March 1, 1869.

By that time it was also found to be advantageous to build down the valley of the Columbia to Portland, *and from Portland to Puget Sound.* Portland was then the metropolis of Oregon and the largest city in the Northwest. The towns which have since grown to be cities on the Sound were small, and in the way of furnishing business for a railroad were comparatively unimportant. It was desirable, therefore, to build to Portland first, to the end that business might be secured at once for the new road. There was another reason. It was well known to those whose business it was to find out, that a road from the Upper Columbia over the Cascade Mountains to Puget Sound would be very difficult to build, and it was doubted whether a pass would be found through the Cascades and whether it would be possible to ever build the portion of the road from Wallula over the mountains to the Sound. The object of the act of 1864 being to connect the East with the Pacific Ocean, if the line over the Cascades failed the road must necessarily run down the valley of the Columbia to Portland, and thence to Puget Sound. In order to provide for the building of this road a new land grant was necessary—*from Portland to the Sound.* The joint resolution of 1869 gave the company the right to build this extension, but made no grant of lands, and it failed. Therefore, in the joint resolution of May 31, 1870, we find this provision:

"Also to locate and construct under the provisions and with the privileges *grants* and duties provided for in this act of incorporation its *main road* to some point on Puget Sound *via the valley of the Columbia river* with the right to construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

The reason why the terms "branch" and "main line" in the act of 1864 were transposed in this joint resolution is not apparent unless Congress and the company, knowing that the line down the valley of the Columbia *could* be built, and being uncertain of the feasibility of building over the Cascades, proposed to designate that portion "main line" which was most likely to be constructed.

Attention has been called to the fact that in the indemnity clause in the resolution of May 31, 1870, these words occur: "To the amount of lands that have been *granted* sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of *subsequent to the passage of the act of July 2, 1864.*"

It is claimed that these italicised words "*subsequent to the passage of the act of July 2, 1864,*" refer to all the lands from Wallula down. This is unreasonable. If these words apply to the lands from Wallula to Portland, they apply to the lands from Wallula across the mountains to the Sound, and there was no grant to the line of road over the mountains by the act of 1864. And nobody has ever claimed that. The indemnity for lands "granted subsequent to the passage of the act of July 2, 1864," referred solely to the new grant from Portland to the Sound. It was intended that this new grant from Portland to the Sound should stand on the same footing with the old grant.

This is the more apparent from what immediately follows in the resolution:

"And that twenty-five miles of said main line between its Western terminus and the City of Portland, in the State of Oregon, shall be completed by the first day of January, 1872,

and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points."

It was claimed in the argument in the Court below that the decision of the Supreme Court in United States vs. The Northern Pacific Railroad Company, 152 U. S., 284, sustains appellant's contention in this regard. But that case holds nothing of the kind. The controversy in that case was over lands lying between Portland and Puget Sound upon the line of road not provided for by the act of 1864, but authorized by the joint resolution of 1870, and the Court said, (p. 294):

"We cannot agree that this resolution is to be held in this respect as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound with the right to obtain lands in aid thereof as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road not before contemplated that would directly connect Portland and its vicinity with Puget Sound."

This decision, we insist, not only does not sustain appellant's position, but is a conclusive refutation of that claim.

THE PERHAM MAP.

The map of the general route, filed by the Company March 6, 1875, is known as the Perham Map. As to the lands

granted to the Company for the branch from Wallula to Portland, this map is sufficient as a map of general route. It is not necessary to consider whether it is sufficiently definite on the main line farther East.

In Buttzz vs. The Northern Pacific Railroad Company, 119 U. S., p. 55, the Supreme Court had under consideration this very act of July 2, 1864, and was passing upon the point raised by counsel as to when the general route of the road might be considered as fixed. In deciding that point the Court uses this language:

"The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line, as fast as may be requried for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, *or from a knowledge of it* and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the In-

terior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove useless."

In St. Paul and Pacific R. R. Co. vs. The Northern Pacific R. R. Co., 139 U. S., p. 19, the Court, in construing this act of July 2, 1864, says:

"It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about two thousand miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any

case would extend along the route which was fixed, and a map of which was filed in the department."

Under these authorities this Perham map, insofar as the grant from Wallula to Portland is concerned, was such a map of general route as was contemplated in the third section of the act of 1864. It was, from the nature of the country, practically the only map that ever could be filed. True, no withdrawal of lands was made by the Commissioner of the General Land Office upon the filing of this map. But the action of the land department with reference to the map is not important. There is no provision in the act of 1864 that contemplates an approval of the map of general route by the Commissioner of the General Land Office or the Secretary of the Interior. The act contained a legislative withdrawal within itself upon the *filing of the map*. In this respect it differed from nearly all the land grant acts up to that time.

And it was this difference, or in the overlooking of it rather, that led the Commissioner of the General Land Office into the error contained in his letter to the Secretary of the Interior of June 22, 1865. Transcript of Record, pp. 68-69.

This is sufficiently shown by comparing the description of a map of general route in Bultz vs. Northern Pacific R. R. Co., supra, and the commissioner's description, which is:

"The evidence required of the route under the established ruling of the department is a *connected map* showing the exact location; the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section, or smallest legal subdivisions cut by the route."

The commissioner was evidently mistaken as to what contituted a map of general route under the act. But this mistake could not affect the company. The company had filed its map, and by so doing had complied with the act. The refusal of the Commissioner to order a withdrawal upon the filing of this Perham map, so far as the branch road is concerned, did not defeat the legislative withdrawal provided for in the act upon the filing of such a map. The rights of the company were the same irrespective of the action of the Commissioner.

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public official, the laws will protect him."

Lyttle et al vs. The State of Arkansas, 9, How., 333.

Shepley vs. Cowan, 91 U. S., 339.

This map remained on file in theLand Department as a public record. It must be presumed that the act of February 25, 1867, was passed by Congress with a full knowledge of the existence of this map and its legal effect, and that the State of Oregon took its grant with a like knowledge.

In 1867, when the State of Oregon took its grant, the Northern Pacific Company had a qualified title to these lands by the location of the branch road "down the valley of the Columbia," by the act of 1864, and by the filing of the Perham map, and a survey or filing of any other map was necessary only to particularize the odd sections within the limits of the grant.

In construing the acts of 1864 and 1867 it is the duty of

the Court to ascertain and give effect to the intention of Congress in passing those acts.

U. S. vs. Southern Pacific Co., 146 U. S., 570.

Winona & St. Paul R. R. Co. vs. Barney, 113 U. S., 618.

Considering the length of the road, the condition of the country through which it passed, the difficulties, engineering and financial, which attended its construction at all, the length of time allowed for its construction—twelve years by the act (subsequently increased to sixteen years)—it would be unreasonable to assume that Congress within three years from the passage of the act, intended to take away any portion of the land granted the Northern Pacific Company.

Title to these lands was vested by the act in the Northern Pacific Company upon condition subsequent, and that title remained in said Company until Congress declared a forfeiture of it for the non-performance of such condition subsequent. No person or corporation could assert any valid claim to said lands until after such forfeiture was declared.

Schulenberg vs. Harriman, 21 Wallace, 63.

Something is claimed by reason of the acquiescence of the Northern Pacific Company in the refusal of the Commissioner to order a withdrawal on the Perham map. But there was no acquiescence. The commissioner declined to order a withdrawal, and there was no law to compel him to do it. The Company kept on asking for withdrawal, and endeavoring in every way to the best of its abiltiy to overcome the objections of the Land Office.

THE WORD "GRANTED" IN THE EXCEPTIONS TO THE GRANT IN SEC. 3 OF THE ACT OF 1864.

It is claimed by appellant that it is aided by the exception contained in the grant of July 2, 1864, and that where the act excepts out of the grant lands "reserved, sold, *granted* or otherwise appropriated," etc., Congress had in contemplation this subsequent "*grant*" to the State of Oregon," or some similar one. On principle this is unsound. By authority it is completely overthrown. The law is settled by the Supreme Court that the exceptions in a grant to a railroad company are not for the benefit of, and cannot be taken advantage of by, another railroad company with a subsequent grant, where the two grants conflict.

In the case of the M. T. & K. Ry. Co. vs. The K. & P. Ry. Co., 97 U. S., 491, the reservation was of "lands" sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached ,and "mineral lands." And the Court, speaking of this reservation in the grant says: "It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

It will not do to say that this is dictum. It is *not* dictum. The very question, and the only question in that case was, as to the right of two railroads under conflicting grants. One road received its grant in July, 1862, the other in March, 1863.And the Court said, speaking of the grant of 1863:

"Upon the principle already announced in considering the time when the grant to the plaintiff took effect, the title of the defendant to the lands thus set apart to it, had there been no previous disposition or reservation of them, would have become perfect and by relation have vested from the date of the act. But so far as the lands were identical with those covered by the previous grant to the plaintiff by the acts of 1862 and 1864 the title could not attach, as it had already passed from the Government."

True, the word "granted" is not included in the description of the lands reserved, but certainly it is no stronger word than the words used, and might well be included in the phrase "or otherwise disposed of." If the lands in that case were not reserved out of the grant it is difficult to see why they should be in this.

But that there may be no question as to the proper construction of this reservation in the act of July 2, 1864, we ask the Court's consideration of the case of the St. Paul and Pacific Railroad, 139 U. S., pp. 1 to 19.

The facts in that case were as follows:

By the act of March 3, 1857, lands were granted to the Minnesota and Pacific Railroad Company, which afterwards became the St. Paul and Pacific. Some of the lands thus granted were the same as those afterwards granted to the Northern by act of July 2. 1864.

The route of the M. & P. Ry. was subsequently changed by joint resolution of Congress, July 12, 1862.

By act of Congress, March 3, 1865, this joint resolution was repealed, and the lands granted by the act of 1857 were again granted to the St. Paul and Pacific Company.

By act of Congress, March 3, 1871, the route of the St. Paul and Pacific was again changed, and other lands granted it in consideration of its reliquishing those previously granted on certain portions of its route. The identical point was raised there as here, namely, that the grant to the Northern Pacific reserved lands which might subsequently be granted to some other Company, as they were in that case subsequently granted to the St.Paul and Pacific. The Supreme Court holds against such a construction, and says: "But independently of this conclusion we are of opinion that the exception in the act of making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embod a provision which would often be repugnant to and defeat the grant itself."

This decision is conclusive of the question raised here. This is certainly not dictum. By reference to this case, as it was tried and decided in the Court below, it will be seen that the very point urged here was relied on there, and that the decision of the case in a great measure depended on the decision of that point. The case is reported in the 26th Fed. Rep., 551, and for the convenience of the Court we quote the following from the opinion, pp. 557, 558:

"Assuming the priority of the Northern Pacific grant, it is earnestly contended that by its terms all subsequent grants made prior to the definite location of its road are excepted. The definite location, it is conceded, was not made until after the act of 1871. The difference between the language of the grant to the Union Pacific, construed in 97 U. S., supra, and that in the grant to the Northern Pacific, is the basis of this argument. The former grant reads thus:

"Five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

12 St. at Large, 492, Sec. 3.

In the latter we find these words:

"And whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, or prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The question is as to the intent of Congress in these acts; for as to its power as owner to dispose of these lands as it pleases, there can be no question. In Missouri, K. & T. Ry. Co. vs. Kansas Pacific Ry. Co., 97 U. S., 497, the Supreme Court said:

"It is always to be borne in mind in construing a congressional grant that the act by which it is made a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should

not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield to this, as in all other causes, to the legislative will."

We are not limited, therefore, to the technical force and meaning of terms as used in conveyances and contracts between individuals. We must construe this act as any other law of Congress, and ascertain from all means at command the intent of the legislator. Stress is laid on the use of the word "granted" in the one act, and its omission from the other. This word, it is claimed, has a well-recognized meaning in the land legislation of Congress, distinct from "sale," "pre-emption" and "homestead." Its use indicates the intention of future grants within this territory, and notifies the grantee that such future grants, if made before its definite location, will have precedence. In fact it reserves from this all such future grants. The vastness of this grant, and the wide range given for the location of the road, are suggested as the reasons why Congress increased the exceptions previously made to the Union Pacific act. The fact, as stated, that this is the only land grant act in which this word is used in a similar connection is noticed as evidence of the intent. At the hearing, the arguments in favor of these views were forcibly presented and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., supra, places all land grant roads on the same plane

—and that, a different one from that occupied by settlers and private purchasers—and settles all conflicts of title by a rule clear, simple and just, viz: priority of grant. Congress may fairly be regarded as standing indifferent between all roads, and intending to apply this just and simple rule of priority as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the latter beneficiary averring such departure. The language of each act is broad, and covers every possible disposition by the Government intermediate the act and the location. "Sold, reserved, or otherwise disposed of" in one, "reserved," sold, *granted* or otherwise appropriated" in the other. Is any term broader or more comprehensive than "disposed of?" Used in a similar private contract between individuals, would anyone doubt the sweep of the exception? Yet the Supreme Court ruled that it did not except "any portion of the designated lands for the purpose of aiding in the construction of other roads." Counsel would limit the scope of the term on the principle *noscitur a sociis*. The use of the qualifying word "otherwise" makes against the application of that principle. But, giving it full force, is not a grant a disposition kindred to a sale, if not a reservation? Counsel's argument rests on the technical force of the phraseology, while I understand the Supreme Court to base the rule on the presumed attitude of Congress towards such public improvements. While the grant is vast, the line to be constructed in order to earn it is continental. The grant was made because Congress believed the public good required the road, and in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it

is fairer to presume that Congress intended the freest bounty, rather than to believe that it burdened the grant with extra exceptions, which, when construction became feasible, might largely deplete it of value. Further, Congress had in thought at the time other railroad grants,and in the first proviso made special provision therefor. It there deducted from this grant any lands theretofore granted to any road whose line should prove to be upon the same general route, and authorized consolidation of companies. Without consolidation, the Northern Pacific would fail of such lands, and that without any right of indemnity elsewhere along its line. If further special provision for conflict with other land grants was intended, would not such intention have been made manifest by further proviso, or at least by language of unmistakable import? I can but think the rule laid down in 97 U. S., supra, applicable to the Northern Pacific land grant, and therefore must hold that its title to the lands in place antedates that of the defendant."

In the light of these authorities counsel's position is untenable. These lands were not reserved out of the grant to the Northern Pacific Company because of the use of the word "granted," and the State of Oregon took nothing by the act of 1867, as far as these particular lands are concerned.

Upon this point we call the Court's attention to the decision of the Supreme Court in the case of the United States vs. The Southern Pacific Co., 146 U. S,. 570.

This Court is familiar with the facts in that case. In deciding the case the Supreme Court says (pp. 604-6-7):

"Again, it is urged that the grant to the Atlantic and Pacific Railroad Company having been forfeited, there is noth-

ing now in the way of the Southern Pacific Railroad Company's grant attaching to these lands; that in the interpretation of rights under land grants, regard has always been had by this Court to the intention of Congress; that it was the intention of Congress that these lands should pass to some Atlantic and Pacific Railroad Company or the Southern Pacific Railroad Company; that they cannot now be applied to aid in the construction of the former company's road; and that, therefore, to carry into effect the intent of Congres, they should be applied to aid in the construction of the latter company's line. We think this contention is erroneous, both as to the law and to the intent of Congress.

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"Indeed, the intent of Congress in all railroad land grants as has been understood and declared by this Court again and again, is that such grants operate at a fixed time, and shall take only such lands as at that time are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands."

* * * * * *

"Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Con-

gress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture of its own benefit"

THE JOINT RESOLUTION OF MAY 31, 1870.

It was urged on the trial in the Court below that the joint resolution of May 31, 1870, was not an amendment to the act of 1864, but was a "complete piece of legislation" in itself.

This, we submit, is not correct. This resolution could not stand alone. Without reference to the act of 1864 it is a meaningless thing. In interpreting this resolution reference must be constantly made to the act of 1864. It starts out by authorizing the company to issue bonds and "secure the same by mortgage upon its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchises as a corporation." To what "property" and "franchises" is reference made here? Without the act of 1864 there could be no answer. It refers to the "priv-

ileges, grants and duties provided for in its act of incorporation." What privlieges, grants and duties? Again the answer is found in the act of 1864.

All that this resolution does is to amend the act of 1864 by:

First—Authorizing the company to mortgage its land grant (which before it could not do).

Second—Changing the designation of the road down the Columbia River from "Branch" to "Main Line," and the road across the Cascades from "Main Line" to "Branch."

Third— Providing an additional ten miles on each side of the line of the road for indemnity lands.

Fourth—Making a new grant from Portland to Puget Sound.

Otherwise the act of 1864 remains in full force and effect, and all the other sections of the act of 1864 apply to the new grant from Portland to Puget Sound.

This resolution is a legislative recognition of the right of the company to these lands.

By authorizing the company to mortgage them Congress indicated clearly enough that it was not then understood that any other company had any right to them. As was said by the Circuit Judge in

Denny vs. Dodson, 32 Fed. R., 903.

"But, in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of Congress, so as to cut off the rights of the United States mentioned above. Such per-

mission was given when, on the thirty-first of May, 1870, by joint resolution of the two houses, Congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property, of all kinds and description, real, personal, and mixed, including its franchise as a corporation. In the property mentioned, the lands granted to the company are included. It can hardly be supposed that Congress would have allowed this mortgage if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that Congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work."

THE MAP OF AUGUST 13, 1870.

It is immaterial whether we call the map of 1870 a map of "general route" or of definite location." So far as appears it was filed as soon as it was practicable to file it. Insofar as concerns the road from Wallula to Portland, it is identical with the Perham map. Under this map a withdrawal of all these lands was ordered by the officers of the Land Department. This map is a recognition of the Perham map, and

shows that there was a legislative withdrawal at the time of filing the Perham map. Any uncertainty or change as to the main line did not affect the branch line, which remained unchanged from the beginning.

THE ACT OF SEPTEMBER 29, 1890—FORFEITURE ACT.

A reference to the forfeiture act shows conclusively that Congress considered that by that act these lands were forfeited. The first section of the act provides for the forfeiture of unearned grants, and says:

"*And the United States hereby resumes title thereto.*"

* * * * * *

"*And all such lands are declared to be part of the public domain.*"

In the fifth section provision is made for confirming title to "lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain north of the line known as the Harrison line, drawn from Wallula, Washington, easterly," etc. Also for

* * * * * *

"rights of way and riparian rights, heretofore attempted to be conveyed to the City of Portland, in the State of Oregon,

by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8, 1886, (descriptive of lands) * * *forfeited by this act are hereby confirmed unto the said City of Portland.*"

The lands above described as being confirmed to the City of Portland are with reference to the Northern Pacific grant situated similarly to the lands in controversy here.

If the contention of appellant is correct here, this legislation was entirely unnecessary. But Congress did not think so, because in the act these lands are described as "*forfeited by this act.*" If a part of the lands from Wallula to Portland were forfeited it needs no argument to show that they were all forfeited.

That there might be no doubt as to the meaning of the act and plainly intending to provide against any misunderstanding of the effect of the act upon overlapping grants (such as arises in this case) the 6th section of the act says:

"Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit *of any state or corporations to which lands may have been granted by Congress*, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon *any state*, *Corporation or person* lands which are excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such

lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line."

While the decisions of the Secretary of the Interior are not authority, yet as to questions involving title to public lands, they are entitled to and have always been accorded great respect by the Courts.

In this connection, therefore, we call the Court's attention to the letter of Secretary Noble, Secretary of the Interior to the Commissioner of the General Land Office, date February 17, 1892.

Every proposition made by appellant here was contended for in a protest then before the Secretary for consideration and made by the Oregon and California against the decision of the Commissioner of the General Land Office, holding these lands as forfeited by the act of September 29, 1890, and the Secretary overruled all the objections of contestants and held the lands as forfeited.

Respectfully submitted.

J. L. STORY, and

GEARIN, SILVESTONE & BRODIE,

Attornes for Appellees.

No. 356

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON,

Appellant,

vs.

THE CITY OF NEVADA, et al.

Appellees.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

INDEX.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

ELEANOR C. HUNTINGTON, a *Femme Sole*
Complainant,
vs.
THE CITY OF NEVADA, in the County of Nevada and State of California, and D. S. BAER, T. H. CARR, A. GAULT, J. F. HOOK, and J. C. RICH, Composing the Board of City Trustees of the said City of Nevada,
Respondents.

Bill of Complaint.

To the Judges of the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California:

Eleanor C. Huntington, a femme sole, of the city, county, and State of New York, and a citizen of the State of New York, United States of America, brings this her bill against the city of Nevada, of the county of Nevada,

State of California, United States of America, and a citizen of said State of California, United States of America, and D. S. Baker, of the city of Nevada, State of California, and a citizen of the State of California, United States of America; and T. H. Carr of the city of Nevada, State of California, and a citizen of the State of California, United States of America; and A. Gault of the city of Nevada, State of California, and a citizen of the State of California, United States of America; and J. F. Hook of the city of Nevada, State of California, and a citizen of the State of California, United States of America; and J. C. Rich of the city of Nevada, State of California, and a citizen of the State of California, United States of America.

And thereupon your oratrix complains and says:

That heretofore, to-wit, on the 12th day of March, 1878, an act was passed by the legislature of the State of California, entitled "An act to amend an act to incorporate the city of Nevada, and all acts supplemental thereto, and to repeal all acts in conflict herewith," approved March 12th, 1878, and that by virtue of the said act of the legislature of the State of California, approved March 12th, 1878, the people of the city of Nevada in the State of California became and were, and ever since have been, a municipal corporation under the name and style of the City of Nevada, and by that name may complain and defend in all courts and in all actions and proceedings, purchase, receive, and hold property and sell or otherwise dispose of the same for their common benefit, and that the said city of Nevada is still in existence under the

said corporate name and style mentioned and referred to in said act; and solely by virtue of the provisions of said act of March 12th, 1878, and not otherwise.

And your oratrix further shows that the respondents D. S. Baker, T. H. Carr, A. Gault, J. F. Hook, and J. C. Rich are now and have been for more than six months last past the members of the board of city trustees of said city of Nevada, and as such compose said board of city trustees and that they are the legislative body of said city of Nevada.

That your oratrix is now and has been for many years last past a taxpayer and the owner of property situate in said city of Nevada, and that said property has annually been placed upon the assessment-roll of said city of Nevada according to law, and that during all of said times she has annually and within the time prescribed by law paid to said city of Nevada and to the State of California all taxes which were levied or assessed against the said property of your oratrix situate in said city of Nevada aforesaid, and that she is still a taxpayer therein, and said property is now upon the assessment-roll of said city of Nevada, for the fiscal year 1895-96, and that she has paid all State, county, and municipal taxes thereon.

And your oratrix further alleges and shows that the people of the State of California in the year 1879 did in convention duly assembled adopt a new constitution to supersede the old constitution of the State of California, and that said new constitution of the State of California was thereafter ratified by the people of the State of California at an election held on the 7th day of May, 1879, and that said new constitution of the State of California

took effect on July 1st, 1879, for some purposes, and upon January 1st, 1880, for all purposes, and that ever since said last-named date the said new constitution of the State of California has formed and has been the only constitution for the government of the State of California and its legislative, executive, and judicial departments, and the people, citizens, and residents of the said State of California.

And your oratrix further shows that the said act of the legislature of the State of California so approved March 12th, 1878, as hereinabove shown, was passed and adopted and was the law for more than two years prior to the time the said new constitution of the State of California was adopted, ratified, or took effect, and that said act of March 12th, 1878, has never been altered, amended, or repealed either by the legislature of the State of California, or under or by virtue of any of the terms or provisions of the said new constitution of the State of California, and that said act of the legislature of the State of California, approved March 12th, 1878, incorporating said city of Nevada is now in full force and effect.

And your oratrix further shows that heretofore, to-wit, on the 18th day of July, 1895, the said board of trustees of said city of Nevada did pass an ordinance known as Ordinance No. 127, in the words and figures following, to-wit:

Ordinance No. 127.

An ordinance determining the necessity of the city of Nevada acquiring and owning waterworks and water, the cost of which will be in excess of its ordinary annual income.

The board of trustees of the city of Nevada do ordain as follows:

Section 1.

It is hereby determined that the public interest of Nevada City demands the acquisition and ownership by said city of waterworks, water, reservoirs and reservoir sites, pipes, aqueducts conduits, and all other appliances and things necessary or convenient for the storage of water by said city and the supplying of water to the residents thereof.

Section 2.

That the necessary cost thereof will be in excess of the ordinary annual income and revenue of said city.

Section 3.

This ordinance shall be published for three weeks in the Nevada City Daily 'Transcript,' and shall take effect on the 12th day of August, 1895.

Passed by the following vote:

Ayes: Baker, Carr, Hook, Gault, Rich.

Noes: ————.

Passed the 18th day of July, 1895.

D. S. BAKER,

President of the Board of City Trustees of Nevada City.

Attest: T. H. Carr, Clerk of the Board."

That said ordinance No. 127 has never been modified or rescinded, but is still in full force and effect.

That heretofore, to-wit, on the 17th day of September, 1895, the said board of trustees of the city of Nevada did pass an ordinance known as Ordinance Number 128, calling a special election, and submitting to the qualified voters of said city of Nevada at said election the proposition of incurring a municipal indebtedness to the aggregate sum of $60,000.00 for the purpose of acquiring lands, water rights, rights of way, reservoirs, and other rights and things whatsoever necessary to construct and complete public waterworks for the said city, the cost of which would be too great to be paid out of the ordinary annual income and revenue of said city, and providing for the issuance of bonds of said city to said amount for said purpose, and prescribe the time and manner of holding such election and the voting for or against incurring the said indebtedness, and otherwise regulating said election and that the said Ordinance Number 128 was and is in the words and figures following, to-wit:

Ordinance No. 128.

An ordinance calling for a special election in the city of Nevada submitting to the qualified voters of said city at said election the proposition of incurring a municipal indebtedness to the aggregate amount of $60,000.00 for the purpose of acquiring lands, water rights, rights of way, reservoirs, and other rights and things whatsoever necessary to construct and complete public waterworks for the said city, the cost of which will be too great to be paid out of the ordinary annual income and revenue of said city; providing for the issuance of bonds of said city

to said amount for said purpose; prescribing the time and manner of holding such election, and the voting for or against incurring such indebtedness, and otherwise regulating such election.

The board of trustees of the city of Nevada do ordain as follows:

Section 1.

Whereas, the board of trustees of the city of Nevada by ordinance heretofore duly passed by a vote of more than two-thirds of its members, i. e., by a unanimous vote, approved and published as required by law, has determined that the public interest and necessity demand, and whereas, the public interest and necessity do demand the acquisition of lands, water rights, rights of way, reservoirs, and the construction and completion of a system of waterworks that will furnish for the present and future an ample supply of pure, wholesome water to protect the health, comfort, safety, and best interest of the inhabitants of said city, and that the cost thereof is too great to be paid out of the ordinary annual income and revenue of said city; and

Whereas, said board of trustees has determined and does hereby determine that the assessed value of all property, both real and personal, in said city for taxable purposes is the sum of $855,299.00, and that the annual income and revenues of said city do not amount to more than the sum of $8,000.00; and

Whereas, by resolution, said board did duly appoint and authorize F. M. Miller, Geo. L. Nusbaumer, and W. F. Boardman, as civil engineers to make surveys, plans

and estimates of said contemplated waterworks on behalf of and in the interest of said city of Nevada, and

Whereas, said board of trustees has heretofore caused to be made by F. M. Miller, Geo. F. Nusbaumer, and W. F. Boardman, plans and estimates of the cost of said contemplated public improvements, which said plans and estimates were duly submitted to said board, and by them heretofore duly accepted and approved after careful examination and consideration by said board; and

Whereas, said Geo. L. Nusbaumer and W. F. Boardman are each and all competent civil engineers, who before doing said work have had successful experience in such work as the aforesaid contemplated public improvements, which facts said board of trustees has determined and does now unanimously adjudge and determine hereby; and

Whereas, it appears by said plans and estimates that the cost of such contemplated public improvements will amount to $60,000.00 in the aggregate, which amount is largely in excess of the ordinary annual income and revenue of said city;

Now, therefore, in consideration of the premises, and in pursuance of the acts, ordinances, and proceedings aforesaid, and of the statutes in such cases made and provided, a special election is hereby called and ordered to be held and conducted in and for the city of Nevada, State of California, at the time and in the manner hereinafter fixed and prescribed, at which special election there shall be submitted to the qualified voters of said city of Nevada, to be voted upon at said special election as hereinafter provided, the proposition of incur-

ring an indebtedness by said city of Nevada amounting in the aggregate to the sum of $60,000.00 for the purpose of acquiring lands, water rights, rights of way, reservoirs, and all other rights and things whatever necessary for the construction and completion of public waterworks for the said city of Nevada and constructing and completing said waterworks.

Section 2.

The objects and purposes for which the said indebtedness is proposed to be incurred are as follows: The acquisition by the said city of Nevada of reservoirs, rights of way, lands, and all other rights and things whatsoever, necessary for constructing and completing public waterworks for said city and its inhabitants, and to establish, complete, and thoroughly equip a system of public works therein with reservoirs, pipes, mains, laterals, and whatsoever things shall be necessary therefor to supply said city and its inhabitants with an adequate supply of wholesome water.

Section 3.

The estimated cost of the acquisition and construction of said reservoirs, lands, rights of way, water rights, and other rights and things whatsoever necessary therefor, and of the whole of said public improvements is as follows, to-wit, the sum of $60,000.

Section 4.

The acquisition of said lands, reservoirs, rights of way,

water rights, and all other rights and things whatsoever required for constructing and completing said public waterworks, and the said construction and completion of said waterworks as aforesaid are necessary to the city of Nevada and its inhabitants for the following reasons, to-wit:

First.—Because it now is, and for many years last past has been, utterly impossible to obtain an adequate supply of pure, wholesome water for the use of said city and its inhabitants for any fair or reasonable sum of money, the price charged therefor being exorbitant.

Second.—Because the present system of waterworks owned by Mrs. E. C. Huntington, and the only source of supply now and for many years last past supplying said city and its inhabitants thereof with water, is imperfect, the pipes, mains, and laterals are corroded and clogged with rust, and do not extend to all parts of the city, or supply all the inhabitants thereof with water.

Third.—Because in case of emergency, fire, etc., there is a wholly adequate supply and insufficiency of pressure of water for the needs and requirements of said city, and that by no means other than the acquisition of the aforesaid property, rights, and things, and the construction and completion of said public waterworks as hereinbefore set forth, can said city and its inhabitants be properly supplied. That the public interest and necessities of the city of Nevada and its inhabitants demand the acquisition, construction, and completion of such public waterworks.

Section 5.

That the cost of the acquisition of said property, rights, and things and of the construction and completion of said reservoirs is and will be too great to be paid out of the ordinary annual income and revenue of said city of Nevada, and that it is necessary to incur an indebtedness in the aggregate sum of $60,000.00, and to issue bonds of the said city to that amount to pay the cost thereof.

Section 6.

That bonds of the city of Nevada of the character known as 'serials,' to the aggregate amount of $60,000.00, will be issued for the cost of said public improvements above in this ordinance set forth if the proposition to incur said indebtedness be accepted by two-thirds of all the qualified voters voting at said election, and said bonds will be issued and made payable so that one-fortieth part of the whole amount shall be paid each and every year on a day and at a place to be fixed by said board of trustees, together with interest on all sums unpaid at such date at the rate of six per cent per annum, until the entire debt shall be paid.

Section 7.

The special election hereby called as aforesaid shall be held on Monday, the 28th day of October, 1895, and shall be held and conducted, the votes thereat received and canvassed, returns thereof made, and the result thereof

ascertained and determined as herein provided, and according to the law governing elections in said city of Nevada, and the polls of such election shall be and remain open from sunrise of the 28th day of October, 1895, to the hour of five o'clock in the afternoon of said day, when the polls shall be closed.

Section 8.

Notice of the said special election shall be published for not less than two weeks prior to said day of election, and after the final publication of this ordinance as hereinafter provided in at least one of the newspapers published in said city of Nevada, in accordance with the terms of the statute in such cases made and provided.

Section 9.

The ballots which shall be used at the said special election shall be of the same character and form as those ballots used at other municipal elections in the said city of Nevada, except as otherwise provided herein. Each of said ballots shall have printed thereon the following heading, to-wit, 'Municipal Ticket,' underneath which shall be printed the number of the precinct in which such ballot is to be voted, underneath which shall be printed the following words, to-wit, 'proposition for incurring an indebtedness by the city of Nevada to the aggregate amount of $60,000 for the acquisition of reservoirs, lands, rights of way, water rights, and all other things and rights whatsoever necessary for constructing and com-

pleting said waterworks, and constructing and completing the same as set forth in Ordinance No. 128.' Underneath this shall be printed the following: 'To vote for or against incurring said indebtedness stamp a cross (X) to the right of and against the answer which you desire to give.' Underneath which shall be printed in one line the following: 'For incurring the indebtedness,' to the right of which shall be printed in one square the word 'Yes,' with a blank square to the right thereof, and immediately below the same, in one line the following: 'For incurring the indebtedness,' to the right of which shall be printed in one square the word 'No,' with a blank square to the right thereof. Every voter desiring to vote in favor of the proposition of incurring the said indebtedness shall, in voting, stamp a cross (X) in the blank square to the right of the word 'Yes' printed upon his ballot as aforesaid; and every voter desiring to vote against said proposition shall, in voting, stamp a cross (X) in the blank square to the right of the word 'No' printed upon his ballot as aforesaid.

Section 10.

The election precincts and the numbers and boundaries thereof shall be the same as those heretofore established, creating, and designated by the board of trustees of the said city of Nevada, and now existing therein. The places of election, and the officers who shall conduct said special election in each of the several precincts of said city of Nevada, shall be and they are hereby designated and appointed as follows, to-wit:

The places of election shall be:

For Precinct One: 'Cutter's Carriageshop,' on Boulder Street;

For Precinct Two: 'City Hall,' on Broad Street.

For Precinct Three: 'Transcript Building,' on Commercial Street.

The officers who shall conduct said special election shall be:

For Precinct One:

Inspectors.—Richard Tremain and John Brodie.

Judges.—J. D. Fleming and Samuel Curtis.

Clerks.—H. C. Weisenburger and J. J. Jackson.

Ballot Clerks.—George B. Johnson and John Rafter.

For Precinct Two:

Inspectors.—A. D. Allen and C. J. Brand.

Judges.—John Swart and E. Booth.

Clerks.—I. J. Rolfe and E. J. Rector.

Ballot Clerks.—Max Isoard and John Webber.

For Precinct Three:

Inspectors.—Geo. M. Hughes and John Dunnicliff.

Judges.—B. N. Shoecraft and Henry Lane.

Clerks.—J. E. Carr and J. E. Isaac.

Ballot Clerks.—Felix Gillett and A. Hartung.

Section 11.

As soon as the polls are closed in each of said precincts the judges of election shall canvass the votes cast in their respective precincts for and against incurring the indebtedness aforesaid, as nearly as practicable, in the manner provided by law for canvassing votes for municipal offi-

cers elected at elections held in the city of Nevada. The returns for the said precincts shall be made out and signed in the usual form by the officers of election for said precincts respectively, and shall be forthwith deposited with the clerk of the board of trustees of said city of Nevada, together with the ballots cast at said special election in said precincts respectively. The board of trustees of said city shall as soon as the said returns and ballots from all of said precincts have been deposited with said clerk canvass the said returns in the manner provided by law for canvassing returns of election of municipal officers of said city. If, upon the canvass of said returns, it shall be ascertained and determined that at least two-thirds of all the *votes* voting at said special election have voted in favor of the aforesaid proposition for incurring the said indebtedness of $60,000.00, then the bonds of said city of Nevada hereinbefore mentioned shall be issued by the board of trustees as herein by law provided, and as hereafter prescribed by said board.

Section 12.

Immediately upon the passage of this ordinance and its approval by the president of the board of trustees aforesaid, the said ordinance is hereby ordered and directed to be and shall be published in the 'Daily Transcript,' a daily newspaper published in said city of Nevada for the period of two weeks, and shall be published in each issue of said paper as often as the same is published during said period, and the last publication thereof shall not be less than fifteen days prior to the day of the special election hereby called.

In the board of trustees of the city of Nevada, September 18th, 1895.

Passed by the following vote:

Ayes: Baker, Carr, Gault, Hook, Rich.

Noes:

D. D. BAKER,

President of the Board of City Trustees of the City of Nevada.

Attest: T. H. Carr. Clerk of the Board.

Approved September 18th, 1895.

D. S. BAKER,

President of the Board of Trustees of the City of Nevada and the Executive of said City."

That said Ordinance Number 128 has never been modified or rescinded, but is still in full force and effect.

And your oratrix further alleges and shows that thereafter and on the 10th day of October, 1895, the said board of trustees of the city of Nevada did give and cause to be given notice of such special election so thereafter to be held on said 28th day of October, 1895, touching the matters just hereinabove referred to with reference to the incurring of said indebtedness and the proposed issue of said bonds, and that on said 28th day of October, 1895, said special election was in fact held, and that more than two-thirds of all the voters voting at such special election authorized the issuance of the said bonds aggregating sixty thousand dollars as aforesaid.

And your oratrix further shows that since said special election so held on said 28th day of October, 1895, said board of trustees of said city of Nevada have caused to

be issued, printed, published, and circulated, a notice entitled "Notice to Bond Buyers," which said notice is in the words and figures following, to-wit:

"Notice to Bond Buyers.

Sealed bids will be received by the clerk of the board of city trustees for the purchase of $60,000, six per cent annual interest water bonds of the city of Nevada, California, up to 8 o'clock, P. M., of the 12th day of December, 1895. The bonds are all of the denomination of $500. Three of said bonds, together with the interest due on all the bonds, will be payable at the office of the treasurer of said city on the first Monday in December, 1896; and a like number with all interest due will be payable each year thereafter on the same date for 40 years.

The law requires the bonds to be sold for gold coin. The bonds are payable in gold coin or lawful money of the U. S. Bids for the whole or any specified number of said bonds will be considered. The bonds cannot be sold for less than their par value. Money for the bonds must be paid within twenty days after sale. No bids will be considered unless accompanied by a certified check for at least 5 per cent of the amount bid.

T. H. CARR,
Clerk of the Board, Nevada City, Cal."

That said last named notice to bond buyers has never been rescinded or altered, but still remains in full force and effect.

And your oratrix further alleges and shows that in passing said ordinances Numbers 127 and 128, respect-

ively, and in calling said special election hereinabove referred to, and in causing said notice to bond buyers to be so printed, published, advertised, and circulated the said city of Nevada and said board of city trustees of said city of Nevada did assume to act under and by virtue of the act of the legislature of the State of California, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled an act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks; also to repeal an act approved March 15, 1887, entitled an act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State." Approved March 19, 1889.

And also under and by virtue of an act supplemental to said act approved March 19, 1889, and entitled "An act to amend section five of an act approved March 19, 1889, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also, to repeal

an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, March 19, 1889.'" Approved March 11, 1891.

And also under and by virtue of the provisions of an act supplemental to said two last-named acts, and entitled "an act to amend section two of an act approved March 19, 1889, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also, to repeal the act approved March 9, 1885, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State.'" Approved March 11, 1891.

And also under and by virtue of an act supplemental to said three last-named acts, and entitled "An act to amend sections nine and ten of an act entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever; and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain

waterworks'; also, to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State.'" Approved March 19, 1889. Approved March 19, 1891.

And also under and by virtue of an act supplemental to said four last-named acts, and entitled "An act to amend section six and section eight of an act approved March 19, 1895, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever.' And to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State.'" Approved March 1, 1893.

And in that behalf your oratrix further avers and shows that said five acts of the said legislature of the State of California, so approved respectively March 19th, 1889, March 11th, 1891, March 11th, 1891, March 19th, 1891, and March 1st, 1893, did not nor did or could any or either of them increase or diminish, enlarge, or in anywise affect the powers or authority of the said board of city trustees of said city of Nevada, which were fixed in and by said act of the legislature of the State of California incorporating said city of Nevada, and that since said

last-named act took effect it has constituted and been a special charter to the said people of the city of Nevada as hereinabove shown.

That as your oratrix is informed and believes said act of the legislature of the State of California, so approved March 12th, 1878, was a special law, and that the same was not repealed by the adoption of the said new constitution of the State of California hereinabove referred to.

And your oratrix further shows that the said city of Nevada has never been disincorporated, nor has it elected or chosen to reincorporate under the said new constitution of the State of California or to avail itself of any legislation adopted since said new constitution took effect.

And in that behalf your oratrix further avers and shows that, among other things, it was provided in said charter of said city of Nevada under and by virtue of the provisions of said act of the legislature of the State of California, approved March 12th, 1878, as aforesaid, in subdivision 18 of section 8 of said act as follows, that is to say:

"Said board of trustees shall not contract any liabilities, either by borrowing money, loaning the credit of the city, or contracting debts which, singly or in the aggregate, shall exceed the sum of two thousand dollars."

And your oratrix having shown that notwithstanding the fact that the said city of Nevada and said board of directors of said city are prohibited from contracting any liabilities, either by borrowing money, loaning the credit of the city, contracting debts which, singly or in the ag-

gregate, shall exceed the sum of two thousand dollars, as provided in said charter of said city of Nevada, yet the said board of city trustees have taken each and all the said proceedings hereinabove referred to and have advertised and given public notice, as hereinabove shown, that a municipal indebtedness in the sum of sixty thousand dollars is about to be incurred on behalf of said city of Nevada, and that water bonds of said city of Nevada will immediately be issued in the form and upon the terms and conditions specified in said Ordinances numbered 127 and 128, respectively, and as set out in said notice to bond buyers, a copy of which is hereinabove set forth, and said board of said trustees has given out its intention to annually levy a tax upon all the assessable property situate within the corporate limits of the said city of Nevada for the next coming forty years to provide for the payment of the interest and the ultimate redemption of the principal of said bonds, aggregating said sum of sixty thousand dollars, and that under said five acts just hereinabove referred to it will be and become the duty of said board of city trustees to annually levy and cause the same to be collected.

And your oratrix further shows in that behalf that the property of your oratrix will annually be taxed for said forty years to come, together with other property situate in said city of Nevada equally liable for said tax for the purposes aforesaid, which, as your oratrix is informed and believes, and therefore alleges, will be illegal and contrary to law and to the irreparable injury and damage of your oratrix.

And your oratrix further shows that after said taxes

have been so levied and assessed against her said property for the purpose hereinabove set forth that the same will be subjected to sale, and, unless paid, will be sold, to her irreparable damage and loss.

And your oratrix further shows that unless restrained and enjoined by this Honorable Court that said city of Nevada and said board of trustees of said city will incur said indebtedness aggregating said sum of sixty thousand dollars, and will issue and sell said water bonds to the amount aforesaid as set out in said notice to bond buyers hereinabove set forth in full, and that said proposed and threatened action of said city of Nevada and said board of trustees is in excess of the powers of said city of Nevada and said board of trustees, and will greatly affect the market value of the property of your oratrix and the property of all other persons owning property in said city of Nevada similarly situated as the property of your oratrix and subject to said special tax, and that she will thereby be irreparably damaged.

And your oratrix further avers and shows, on her information and belief, that said city of Nevada and its inhabitants are already furnished and supplied with pure, fresh water for domestic and all other necessary purposes, and that said supply of said water is abundant in every respect and for all the wants and necessities of the said city of Nevada and its inhabitants, except in a few remote districts, and that the same is sufficient for all purposes of every kind, domestic, irrigating, extinguishment of fires, and other purposes, and that therefore the interests and demands of said city of Nevada and its in-

habitants do not require the incurring of said indebtedness, nor the issuing nor sale of said bonds aggregating said sum of sixty thousand dollars or any part or portion thereof.

And your oratrix further shows that the rates of the sale and disposition of said water are annually fixed by the said board of city trustees of said city of Nevada, and being the five individual respondents hereinabove named, and that said rates are fair and reasonable, and not oppressive or unjust or discriminating.

And your oratrix further shows that she is the owner of the present system of waterworks at said city of Nevada, and that if said indebtedness be incurred and said bonds be issued and sold as hereinabove set forth, that the same will injure your oratrix and her said property, and that the same will be wholly lost to her, and that the same will greatly affect and impair the value of her said property, to her great loss and damage unless the said city of Nevada and said board of trustees of said city of Nevada be enjoined and restrained by this Honorable Court from further proceeding in said matter.

Wherefore, and because of the matters and things aforesaid, your oratrix respectfully prays this Honorable Court that upon the hearing of this cause an injunction be issued out of and from and under the seal of this Honorable Court enjoining and restraining said city of Nevada and said board of trustees of said city of Nevada, and their and each of their officers, agents, employees, and attorneys from further proceeding in said matter, or from receiving or accepting any bids for the purchase of said

bonds or any part thereof, or from selling, issuing or delivering said bonds or any part thereof, or from levying or collecting said special tax or any part thereof, and that upon such hearing such injunction be made perpetual, and also for her costs and disbursements in this behalf incurred, and for such other and further relief as may be conformable to equity and good conscience.

FRANK T. NILON,
WILSON & WILSON,
Solicitors for Complainant.

RUSSELL J. WILSON,
Of Counsel.

State of California,
City and County of San Francisco, } ss.

Eleanor C. Huntington, being duly sworn, deposes and says that she is the complainant in the above-entitled action; that she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

ELEANOR C. HUNTINGTON.

Subscribed and sworn to before me, this 6th day of December, A. D. 1895.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed December 10, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

Subpœna ad Respondendum.

The President of the United States of America, Greeting, to the City of Nevada, in the County of Nevada, and State of California, D. S. Baker, T. H. Carr, A. Gault, J. F. Hook, and J. C. Rich, composing the board of city trustees of the said city of Nevada.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the third day of February, A. D. 1896, to answer a bill of complaint exhibited against you in said Court by Eleanor C. Huntington, a femme sole, who is a citizen of the State of New York, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars:

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 10th day of December in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 120th.

[Seal] W. J. COSTIGAN, Clerk.

By W. B. Beaizley, Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of February next, at the clerks office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal] W. J. COSTIGAN, Clerk.

By W. B. Beaizley, Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 11th day of December, 1895, and personally served the same on the 11th day of December, 1895, on T. H. Carr, A. Gault, J. F. Hook, and J. C. Rich, composing the board of city trustees of the city of Nevada, by delivering to and leaving with T. H. Garr, A. Gault, J. F. Hook, and J. C. Rich, composing the board of city trustees of the said city of Nevada, said defendants named therein, at the county of Nevada, in said district, an attested copy thereof.

San Francisco, December 14th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By S. P. Monckton, Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the

11th day of December, 1895, and personally served the same on the 12th day of December, 1895, on D. S. Baker, one of the board composing the board of city trustees of the city of Nevada, by delivering to and leaving with D. S. Baker, one of the board composing the board of city trustees of the city of Nevada, said defendant named therein, personally, at the county of Nevada in said District, a certified copy thereof.

San Francisco, December 14th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By S. P. Monckton, Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 11th day of December, 1895, and personally served the same on the 12th day of December, 1895, on the city of Nevada in the county of Nevada and State of California, by delivering to and leaving with D. S. Baker, chairman of the board of city trustees of the said city of Nevada, said defendant named therein, personally, at the county of Nevada, in said District, a certified copy thereof, together with a copy of the bill in equity.

BARRY BALDWIN,
U. S. Marshal.
By S. P. Monckton, Deputy.

San Francisco, December 14th, 1895.

[Endorsed]: Filed Dec. 16, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Judicial District, Northern District of California.

IN EQUITY.

ELEANOR C. HUNTINGTON, a Femme Sole,

Complainant,

vs.

THE CITY OF NEVADA, in the County of Nevada, and State of California, and D. S. BAKER, T. H. CARR, A. GAULT, J. F. HOOK, and J. C. RICH Composing the Board of City Trustees of the said City of Nevada,

Respondents.

Demurrer.

To the Judges of the Circuit Court of the United States in and for the Ninth Judicial District, Northern District of California:

Now, by attorneys, come the above-named respondents, and demur to complainant's bill herein, on the following grounds, to-wit:

1.

That the bill of complaint herein does not state facts

sufficient to constitute a cause of action against respondents, or either of them.

Wherefore, respondents ask to be hence dismissed with their costs.

ALFRED D. MASON,
City Attorney.
J. M. WALLING,
Attorney for Respondents.

State of California, } ss.
County of Nevada, }

I, J. M. Walling, attorney and counselor at law, hereby certify that in my opinion the foregoing demurrer is well founded in point of law, and that the same is interposed in good faith, and not for the purpose of delay.

Witness my hand this 4th day of January, A. D. 1896.

J. M. WALLING,
Attorney and Counselor at Law and Attorney for Respondents.

State of California, } ss.
County of Nevada, }

T. H. Carr, being first duly sworn, according to law, deposes and says: I am a citizen of the United States over the age of 21 years, and am one of the respondents named in the above-entitled action. Affiant further says that I have read the foregoing demurrer on behalf of respondents, and that the same is interposed in good faith and not for the purposes of delay.

T. H. CARR.

Subscribed and sworn to before me this 4th day of January, A. D. 1896.

[Seal] JOHN CALDWELL,
Superior Judge, Nevada Co., Cal.

[Endorsed]: Service of the within by copy admitted this 14th day of January, A. D. 1896. Frank T. Nilon, Wilson & Wilson, Attorneys for Complainant. Filed Jany. 16th, 1896. W. J. Costigan, Clerk.

At a special session of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Wednesday, the 17th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

ELEANOR C. HUNTINGTON,
vs.
CITY OF NEVADA, et al. } No. 12,146.

Order Sustaining Demurrer.

The demurrer of the respondents to the bill of complaint herein having been heretofore submitted to the

court for consideration and decision, and the same having been fully considered, and the oral opinion of the court having been delivered, it is ordered that said demurrer be, and the same is hereby, sustained with leave to the complainant to amend her bill of complaint within ten days if she shall be so advised.

At a stated term, to-wit, the July term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 24th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

ELEANOR C. HUNTINGTON,
vs.
THE CITY OF NEVADA, et al } No. 12,146.

Order Dismissing Bill of Complaint.

It appearing to the satisfaction of the Court that the time within which complainant was allowed to file an amended bill herein expired upon the 18th instant, and that no amended bill has been filed, and the time for filing the same not having been extended,

Now, upon motion of J. M. Walling, Esq., counsel for

respondents, it is ordered that the default of said complainant be and hereby is entered, and it is further ordered that a decree be filed and entered herein dismissing complainant's bill of complaint, and that respondents have judgment for their costs.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ELEANOR C. HUNTINGTON, a Femme Sole,
Complainant,
vs.
THE CITY OF NEVADA, et al.,
Respondents.
} No. 12,146.

Enrollment.

The complainant filed her bill of complaint herein on the 10th day of December, 1895, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the 3rd day of February, A. D. 1896, which is hereto annexed.

The respondents appeared herein on the 6th day of January, 1896, by Alfred D. Mason and J. M. Walling, Esqs., their solicitors.

On the 16th day of January, 1896, a demurrer was filed herein, which is hereto annexed.

On the 17th day of June, 1896, an order sustaining said demurrer, with leave to complainant to amend her bill within ten days, was made and entered herein, a copy of which order is hereto annexed.

On the 24th day of July, 1896, the default of complainant was by order of Court duly entered herein, a copy of which order is hereto annexed.

Thereafter, a final decree was signed, filed, and entered herein, in the words and figures following, to-wit:

At a stated term, to-wit, the July term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 24th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

ELEANOR C. HUNTINGTON, a Femme Sole,
Complainant,
vs.
THE CITY OF NEVADA, et al.,
Respondents.
No. 12,146.

Final Decree.

In this cause the demurrer of respondents to the bill of

complaint of complainant having, on the 17th day of June, 1896, been sustained, with leave to complainant to amend her bill within ten days, and said time, with the extensions thereof, having expired, and no amendment to said bill, or amended bill having been filed, and the default of said complainant having been this day entered, and the Court having, upon motion of J. M. Walling, Esq., counsel for respondents, ordered that complainant's bill be dismissed, and that respondents have judgment for their costs:

Whereupon, upon consideration, thereof, it is ordered, adjudged, and decreed, that the complainant's bill of complaint herein be and the same hereby is dismissed, and that respondents recover from complainant their costs herein expended, taxed at $17.00.

JOSEPH McKENNA,
Circuit Judge.

Filed and entered July 24th, 1896. W. J. Costigan, Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoena, copies of orders, final decree are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] W. J. COSTIGAN, Clerk.

[Endorsed]: Enrolled papers. Filed July 24th, 1896. W. J. Costigan, Clerk.

Hon. JOSEPH McKENNA, Judge.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ELEANOR C. HUNTINGTON, Complainant,
vs.
CITY OF NEVADA, et al., Respondents.
No. 12,146.

Opinion.

Wednesday, June 17, 1896.

Decision of the Court upon demurrer to bill of complaint: Demurrer sustained.

Appearances: Messrs. F. T. Nilon and Wilson & Wilson, for the Complainant;
Messrs. Alfred D. Mason and J. M. Walling, for the Respondents.

The Court (Orally).—This is a suit to restrain the issuance of bonds under an ordinance of the city of Nevada, which is claimed to be illegal.

The ordinance was passed to provide for the erection and maintenance of waterworks, the ordinary expenditures of the city authorized by its charter not being sufficient for that purpose.

The city of Nevada was incorporated prior to the adoption of the new constitution, so-called. The ordinance complained of was passed under an act of the legislature

of this State, with reference to which the following language is contained in the bill:

"And your oratrix further alleges and shows that in passing said Ordinances Numbers 127 and 128, respectively, and in calling such special election hereinbefore referred to, and in causing said notice to bond buyers to be so printed, published, advertised, and circulated, the said city of Nevada and said board of city trustees of said city of Nevada did assume to act under and by virtue of the act of the legislature of the State of California, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State; for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled "An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks"; also to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State," approved March 19, 1889; and also under and by virtue of an act supplemental to said act approved March 19, 1889, and entitled 'An act to amend section five of an act approved March 19, 1889, entitled "An Act authorizing the incurring of indebtedness by cities, towns, "' " etc.

It is urged by complainant that these acts are not applicable to cities or towns incorporated before the adoption of the new constitution. The provision of the con-

stitution relied on is section 6 of article XI, which is as follows:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which clause may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

Desmond v. Dunn, 55 Cal. 245, is cited to sustain the complainant's contention, and the case appears to justify this. But almost immediately the Court began to modify that case. This appears in Barton v. Kallock et al., 56 Cal. 104, and more distinctly in Wood v. Election Commission, 58 Cal. 569.

After a preliminary explanation, which may be omitted, the Court said: "Yet the city and county of San Francisco remains a subdivision of the State, and is not entirely free from legislative control. For, in the same section of the constitution in which the then existing city and town organizations are recognized and the continuance of their existing charters permitted, it is declared that 'cities and towns heretofore . . . . organized . . . . shall be subject to and controlled by general laws.'"

A case preceding that is the case of Earl v. Board of

Supervisors, 55 Cal. 489. The case of Desmond v. Dunn was not passed on there; the case turns on the effect of special laws.

In Donahue v. Graham, 61 Cal. 276, Mr. Justice McKinstry, in a dissenting opinion, held that Desmond v. Dunn decided that the consolidation act was continued in existence as an entirety. The majority of the Court, however, did not pass on Desmond v. Dunn. It held certain provisions of the constitution to be self-operative, and as the street law of San Francisco was inconsistent with it, it was held to be repealed, following McDonald v. Patterson, 54 Cal. 245.

The case of Staude v. Election Commission, 61 Cal. 320, explains Desmond v. Dunn, and interprets the constitution to mean that it is only in the "incorporation, organization, and classification of cities and towns incorporated prior to the new constitution, which are preserved"—that in all else cities and towns are subject to the control of the legislature by general laws.

The case of In re Carillo, 66 Cal. 5, is to the same effect as the case of Staude v. Election Commission.

In re Guerrero, 69 Cal. 89, is not in conflict with In re Carillo or Staude v. Election Commission, but confirms them. The question in the case was the power of the city of Los Angeles to license certain employments. It was held doubtful under the charter, but confirmed by the new constitution. The Court said, at page 92, that the legislature has no power, after the adoption of the new constitution, by special legislation, but intimates that it has by general laws.

I wish to say in passing that I am only making a run-

ning comment on the decisions, and not attempting a complete review of them—only instancing their point.

In Thomson v. Ashworth, 73 Cal. 73, there is a clear interpretation of the constitution. It is there interpreted to mean that the limitation on the power of the legislature over corporations (except as to organization, etc., which may be beyond control) formed prior to it (the constitution) is only by special laws. It cannot be done under special laws, but must be done under general laws. In other words, the legislature may exercise (except as above stated) control by general laws. The Court in that case said:

"It is argued that, according to the views herein expressed, a city may have its charter totally changed without its consent. This is a proper deduction from the ruling herein, but this cannot be done by a special or local law, applicable alone to a particular charter. The result can only be reached by a general law affecting all municipal corporations, or may be all of a class. . . . ."

In City of Stockton v. Insurance Commissioners, 73 Cal. 624, there seems to be a modification, also, of Desmond v. Dunn, in part. The Court in that case say:

"We do not mean to imply that the legislature, even by a general law, can substitute an entirely new charter for an old one, without the consent of the people of the locality. To that extent we understand the decision in Desmond v. Dunn, supra, to be the law.

In passing, this may be said to be an inconsistency, because, if a charter can be amended by general laws, what is the limit of change? We are not now concerned with this apparent or real inconsistency.

The case of People v. Henshaw, 76 Cal. 437, affirms the power over corporations formed prior to the constitution by the legislature by general laws.

There are some other objections to the legality of the ordinances and the issue of the bonds, which I think are not well taken. Upon these views, it follows that the demurrer must be sustained. As I have said, this is a somewhat crude review of the cases, because I have not had the time to put it in proper shape, but the essence of the cases has been properly given.

Mr. Wilson.—It is doubtful, if your Honor please, whether the bill can be amended, but with your Honor's permission, I will take ten days to consider the question.

The Court.—Very well. Let an order be entered granting the complainant ten days in which to amend.

[Endorsed]: Filed June 17th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Northern District of California, Ninth Circuit.

SUIT IN EQUITY.

ELEANOR C. HUNTINGTON, a Femme Sole,
Complainant,
vs.
THE CITY OF NEVADA, in the County of Nevada, and State of California, and D. S. BAKER, T. H. CARR, A. GAULT, J. F. HOOK, and J. C. RICH, Composing the Board of City Trustees of the said City of Nevada,
Respondents.
No. 12146.

Petition for Appeal.

To the Judges of the Circuit Court of the United States for the Northern District of California:

Eleanor C. Huntington, feeling aggrieved by the decision and decree of the said Circuit Court in sustaining the demurrer to and in dismissing her bill in the above-entitled action, by the undersigned, her solicitors herein, respectfully prays and makes application for, and gives notice of, an appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the decree of

said Circuit Court given and rendered in the above-entitled action on the 24th day of July, A. D. 1896, in favor of the above named respondents and against the above-named complainant dismissing her bill. The complainant files herewith her assignment of errors to said decision and decree, showing wherein said decision and decree are erroneous and wherein the complainant has been aggrieved by said decision and decree, and prays that an appeal from said decree may be allowed.

January 22d, 1897.

RUSSELL J. WILSON,
MOUNTFORD S. WILSON,
Solicitors for Complainant.

[Endorsed]: Petition for Appeal. Filed January 22d, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

SUIT IN EQUITY.

ELEANOR C. HUNTINGTON, a Femme Sole,
Complainant,
vs.
THE CITY OF NEVADA, in the County of Nevada, and State of California, and D. S. BAKER, T. H. CARR, A. GAULT, J. F. HOOK and J. C. RICH, Composing the Board of City Trustees of the said City of Nevada,
Respondents.

No. 12146.

Assignment of Errors.

In accordance with Rule Eleven of the United States Circuit Court of Appeals in and for the Ninth Circuit, the complainant files with her petition for an appeal from the decree of the Circuit Court in and for the Northern District of California dismissing her bill an assignment of errors setting out separately and particularly each error asserted and intended to be urged in support of her appeal:

I.

The Court erred in sustaining the demurrer of the respondents to the bill filed against them by the complainant in the above-entitled suit in equity.

II.

The Court erred in sustaining the demurrer upon the ground that complainant has no cause of action upon the facts set forth and alleged in the bill against the respondents.

III.

The Court erred in sustaining the demurrer upon the ground that the legislature of California is not restrained by section six of article XI of the constitution of California adopted in 1879 from exercising control, by general laws, over municipal corporations created prior to its adoption, but only from passing special laws affecting such corporations.

IV.

The Court erred in holding that the case of Desmond v. Dunn, reported in 55 Cal. 245, does not sustain the contention of complainant that the city of Nevada is not subject to the control of the legislature, by general laws, and that the said case has been so modified by subsequent decisions as to nullify its force and effect, so far as bearing upon the case at bar.

V.

The Court erred in holding that the acts of the legislature of California set forth in this specification of error are applicable to cities and towns incorporated before the adoption of the "new constitution," so-called, the said acts being described and entitled as follows:

1. "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also to repeal an Act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State,'" approved March 19, 1889.

2. "An act to amend section five of an act approved March 19, 1889, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever, and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten

thousand inhabitants, to obtain waterworks'; also, to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State,' March 19, 1889," approved March 11, 1891.

3. "An act to amend section two of an act approved March 19, 1889, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever'; and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State,'" approved March 11, 1891.

4. "An act to amend sections nine and ten of an act entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever'; and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also, to repeal an act approved March 15, 1887, entitled 'An act authorizing the

incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, approved March 19, 1889.'" Approved March 19, 1891.

5. "An act to amend section six and section eight of an act approved March 19, 1889, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers, and all necessary public improvements, or for any purpose whatever; and to repeal the act approved March 9, 1885, entitled 'An act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks'; also to repeal an act approved March 15, 1887, entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State.'"

VI.

The Court erred in holding that the said Ordinances Numbers 127 and 128, adopted by the board of trustees of the city of Nevada, and herein complained of, were legally adopted, said ordinances having been passed under the acts of the legislature last above described in the fifth assignment of error herein.

VII.

The Court erred in holding that the said Ordinance

Number 127 so passed by the board of trustees of said city of Nevada, was legally adopted, contrary to the objection of the complainant; that the same was not approved by the executive officer of the municipality, as required by law. The said Ordinance Number 127 in full being as follows:

"Ordinance No. 127.

An ordinance determining the necessity of the city of Nevada acquiring and owning waterworks and water, the cost of which will be in excess of its ordinary annual income.

The Board of Trustees of the city of Nevada do ordain as follows:

Section 1.

It is hereby determined that the public interest of Nevada City demands the acquisition and ownership by said city of waterworks, water, reservoirs and reservoir sites, pipes, aqueducts, conduits, and all other appliances and things necessary or convenient for the storage of water by said city and the supplying of water to the residents thereof.

Section 2.

That the necessary cost thereof will be in excess of the ordinary annual income and revenue of said city.

Section 3.

This ordinance shall be published for three weeks in

the Nevada City 'Daily Transcript,' and shall take effect on the 12th day of August, 1895.

Passed by the following vote:

Ayes: Baker, Carr, Hook, Gault, Rich.

Noes:

Passed the 18th day of July, 1895.

D. S. BAKER,

President of the Board of City Trustees of Nevada City.

Attest: T. H. Carr, Clerk of the Board."

VIII.

The Court erred in not holding that the proceedings leading up to the issue of bonds were illegal.

IX.

The Court erred in holding that the various acts of the legislature set forth in the bill and also in the fifth assignment of error, approved respectively on March 19, 1889, March 11, 1891, March 11, 1891, March 19, 1891, and March 1st, 1893, affect the powers of the board of trustees of said city of Nevada, contrary to the act of the legislature, approved March 12, 1878, incorporating said city of Nevada.

X.

The Court erred in not holding that said city of Nevada had no right or authority to contract any liability, either

by borrowing money, loaning the credit of the city, or contracting debts which, singly or in the aggregate, should exceed the sum of two thousand dollars, as limited and prescribed in its charter under the act of the legislature of the State of California, approved March 12th, 1878.

XI.

The Court erred in not holding that all the acts and proceedings of the said board of trustees in passing said ordinances leading up to the issue of said bonds and the borrowing of the sums contemplated, were illegal and void ab initio.

XII.

The Court erred in rendering its decree dismissing the bill.

XIII.

The Court erred in not rendering its decision in favor of the complainant in said action and granting the relief prayed for in the bill of complaint therein.

XIV.

For the manifest errors appearing in the decision and in the decree dismissing the bill complainant prays that the decision and decree be reversed.

January 22d, 1887.

RUSSELL J. WILSON,
MOUNTFORD S. WILSON,
Solicitors for Complainant.

[Endorsed]: Assignment of Errors. Filed January 22d, 1897. W. J. Costigan, Clk.

At a stated term, to-wit, the November term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

IN EQUITY.

ELEANOR C. HUNTINGTON, a Femme Sole,
Complainant,
vs.
THE CITY OF NEVADA, in the County of Nevada, and State of California, and D. S. BAKER, T. H. CARR, A GAULT, J. F. HOOK and J. C. RICH, Composing the Board of City Trustees of the said City of Nevada.
Respondents.
} No. 12146.

Order Allowing Appeal.

Upon motion of Russell J. Wilson, Esq., one of the

members of the law firm of Wilson & Wilson, and one of the Solicitors for complainant, and upon the presentation and filing of a petition for an order allowing an appeal, and an assignment of errors—

It is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore on the 24th day of July, A. D. 1896, filed and entered herein be, and the same is hereby, allowed, and that a certified transcript of the pleadings, exhibits, record, and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that a bond on appeal in the sum of five hundred ($500) dollars be approved and filed.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ELEANOR C. HUNTINGTON,
Complainant and Plaintiff,
vs.
THE CITY OF NEVADA, et al.,
Respondents and Defendants.
} No. 12146

Bond on Appeal.

Know All Men by These Presents, that we Eleanor C.

Huntington, as principal, and Charles G. Lathrop and Charles H. Lovell, as sureties, are held and firmly bound unto the said defendants and respondents, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said defendants and respondents, their attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court, between the said complainant and the said respondents a decision and decree was rendered against the said complainant, and the said complainant, having obtained from said Court an order allowing an appeal, to reverse the said decision and decree made and entered, in the aforesaid Court, and a citation directed to the said respondents and defendants is about to be issued citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the nineteenth day of February next—

Now, the condition of the above obligation is such, that if the said complainant and appellant shall prosecute her said appeal according to law and to effect, and shall answer all damages and costs that shall be awarded against them, if she fail to make said plea good, then the

above obligation to be void; else to remain in full force and virtue.

CHAS. G. LATHROP. [Seal]
CHAS. H. LOVELL. [Seal]
ELEANOR C. HUNTINGTON. [Seal]

By RUSSELL J. WILSON, and
MOUNTFORD S. WILSON,
Her Solicitors.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

Charles G. Lathrop and Charles H. Lovell, being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of five hundred ($500.00) dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

CHAS. G. LATHROP.
CHARLES H. LOVELL.

Subscribed and sworn to before me, this 22nd day of January, A. D. 1897.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bond on Appeal. Form of bond and sufficiency of securities approved. JOSEPH McKENNA, Judge. Filed January 22, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California.

ELEANOR C. HUNTINGTON,
Complainant,
vs.
THE CITY OF NEVADA, et al.,
Respondents.
No. 12146.

Certificate to Transcript.

I, W. J. Costigan, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 54 inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $31.60, and that said amount was paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 9th day of February, A. D. 1897.

[Seal] W. J. COSTIGAN,
Clerk United States Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA, ss.

The President of the United States, to the City of Nevada, in the County of Nevada, and State of California, and D. S. Baker, T. H. Carr, A. Gault, J. F. Hook, and J. C. Rich, composing the board of city trustees of the said city of Nevada, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 19th day of February next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12146, wherein Eleanor C. Huntington, a femme sole, is complainant and appellant, and you are respondents and appellees, to show cause, if any there be, why the decree rendered against the said complainant and appellant as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOSEPH McKENNA, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 22nd day of January, A. D. 1897.

JOSEPH McKENNA,
U. S. Circuit Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this first day of Feb. 1897.

J. M. WALLING and
A. D. MASON.
Attorneys for Defendants and Respondents.

[Endorsed]: Citation. Filed Feby. 9th, 1897. W. J. Costigan, Clerk.

[Endorsed]: No. 356. In the United States Circuit Court of Appeals for the Ninth Circuit. Eleanor C. Huntington, Appellant, v. The City of Nevada, et al., Appellees. Transcript of Record. Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed February 18th, 1897.

F. D. MONCKTON,
Clerk.

No. 356.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON,

Appellant,

vs.

THE CITY OF NEVADA ET AL.,

Appellees.

Brief of Complainant and Appellant.

RUSSELL J. WILSON,
MOUNTFORD S. WILSON,
Solicitors for Complainant and Appellant.

Filed the 12th day of June, 1897.

.....*Clerk.*

H. S. CROCKER COMPANY, PRINTERS, S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON, *Appellant,* vs. THE CITY OF NEVADA, ET AL., *Appellees.*	No. 356.

Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

Brief of Appellant.

This is an action praying that an injunction be issued enjoining and restraining the City of Nevada and its Board of Trustees, the appellees herein, from proceeding any further in the matter of issuing bonds for the purpose of establishing water works. The demurrer interposed by the respondents to complainant's bill was sustained by the

Court below, and, the complainant declining to amend, her bill was dismissed and final decree entered, and this appeal is from the decree rendered in favor of the respondents and against the complainant and appellant, dismissing her bill. An assignment of errors was duly filed setting out the errors asserted and intended to be urged in support of appellant's appeal, to which assignment we respectfully invite the attention of this Honorable Court.

The facts are fully set forth in the bill of complaint and show that the City of Nevada was duly incorporated by Act of the Legislature of the State of California, passed on the 12th day of March, 1878, and that from that time the City of Nevada became and was a municipal corporation, and still is in existence under and solely by virtue of the provisions of said Act of March 12, 1878, and not otherwise, and that said Act was, and still is, in full force and effect; that in July and September, 1895, its Board of Trustees passed two certain ordinances looking to the creation of an indebtedness of $60,000, for the purchase of water works, although that sum was largely in excess of the amount of indebtedness allowed or permitted to be created by the provisions of the Act of March 12, 1878, under which alone the city had power to act, as claimed by appellant. That, thereafter, further proceedings were had, and in October, 1895,

a special election was held at which more than two-thirds of all the voters voting at said election authorized the issuance of bonds aggregating $60,000 in value. That, thereafter, the said Board of Trustees issued, printed, published and circulated notices calling for bids for the said proposed bonds up to the 12th day of December, 1895, but that this complainant filed her bill in equity on the 10th day of December, 1895, and that from that time thereafter nothing further has been done by the said Board of Trustees in the matter of the sale or disposal of said bonds. That the said Board of Trustees, in taking all the steps set forth looking to the issuance of said bonds assumed to act under and by virtue of certain Acts of the Legislature (fully set forth in the bill and in the 5th assignment of errors), passed after the adoption of the new Constitution of the State of California, which took effect, for some purposes, on July 1, 1879, and for all purposes on January 1, 1880.

It is the contention of appellant that the Act of March 12, 1878, under which the City of Nevada was incorporated, was not in anywise affected by the new Constitution, and that, therefore, the powers of the Board of Trustees were in no degree enlarged or extended by the subsequent Acts of the Legislature (set forth in the 5th assignment of errors), passed in 1889, 1891 and 1893. If this contention be true, then it follows that the Board

of Trustees of the City of Nevada had no authority whatsoever to incur an indebtedness for a sum greater than $2,000, the amount authorized by the Act of March 12, 1878, and that all the acts of the Board looking to the creation of an indebtedness of $60,000 were, and are, null and void *ab initio.*

And it was further shown by the bill that the City of Nevada had never been disincorporated, and had never elected or chosen to reincorporate under the general Municipal Act of 1883, or under the said new Constitution, or to avail itself of any legislation adopted since said new Constitution took effect. It was further shown that the incurring of such an indebtedness as $60,000 was wholly unnecessary and would be a burden upon all tax payers, and would work a great and irreparable injury upon complainant, a tax payer.

The main reliance of complainant and appellant was, and is, the case of Desmond vs. Dunn, 55 Cal., 243, and we respectfully contend that this case is conclusive of the case at bar and that the decree of the Circuit Court should be reversed. We respectfully insist that the criticisms on the case of Desmond vs. Dunn have not overruled it, but have in some instances, explained and modified its effects, though still leaving it the law on this subject in this State, and controlling on this appeal.

As stated by counsel for complainant at the oral argument, the question at once arose when the new Constitution took effect as to what was the status of municipal corporations which had an existence anterior to the adoption of the new Constitution, and in view of the importance of this question it was not singular that the City and County of San Francisco was the first municipality in the State to invoke the consideration and decision of the highest tribunal in the State, which was done in the now well-known case of Desmond vs. Dunn, *supra*.

For the convenience of the Court, we will here insert such parts of that decision as are directly applicable to the question at issue here, and they are as follows:

"The first question which we shall consider is this: If the McClure Charter be constitutional, can it have any force or effect within a municipal corporation which was incorporated prior to the adoption of the Constitution, until a majority of the electors of such corporation vote to accept or organize under it? Section 6 of Art. XI provides that 'Cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all

charters thereof framed or adopted by authority of this Constitution, shall be subject to, and controlled by general laws.' Both of these clauses plainly refer to charters which may be framed by authority of the present Constitution, and the latter clause is expressly limited to charters so framed. Neither applies to charters which existed before the adoption of the present Constitution. All such charters must remain in force until superseded or changed in the mode prescribed by the Constitution. In the absence of any positive provision to the contrary, this is necessarily implied. These are the only provisions which are expressly made applicable to cities incorporated previously to the adoption of the Constitution; and the first expressly provides that any of such cities may become organized under general laws whenever a majority of the electors of such city shall so determine; and the other, that any charter framed or adopted under the present Constitution shall be subject to, and controlled by general laws. But charters not framed or adopted by authority of said Constitution, need not be subject to or controlled by general laws. Therefore, the charter of the City and County of San Francisco, which antedates the present Constitution, and was not framed or adopted by authority of it, is not subject to, or controlled by general laws. From which it follows, that if the McClure Charter falls within the term 'general laws,' it cannot have any

force or effect within the City and County of San Francisco, until a majority of the electors thereof so determine, in the manner provided in the Constitution, unless there be some other provision of the Constitution which gives force and effect to said Charter, without such determination of a majority of the electors.

"As these two clauses are the only ones which expressly refer to cities which had charters before and at the time of the adoption of the Constitution, and as many of the other provisions of the Constitution unmistakably refer to charters to be framed or adopted after the adoption of the Constitution, it is clearly our duty, upon well-established principles of construction, to hold that any general provisions which seem to conflict with these special provisions, were intended to apply to charters framed subsequently to the adoption of the Constitution. (Dwarris on Statutes, 765; Cooley's Const. Lim., 63; Commonwealth v. The Council of Montrose, 52 Pa. St., 391; Wise v. Button, 25 Wis., 109).

"To the foregoing views, one objection is raised, which is not wholly devoid of plausibility. It is, that the cities mentioned in section 6 are corporations other than consolidated cities and counties, and that, therefore, the provisions of that section do not apply to the City and County of San Francisco. It seems to us, however, that there is a clause in section 7 which wholly obviates this ob-

jection. It reads as follows: 'The provisions of this Constitution, applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated governments.' The meaning of this plainly is, that all the provisions of the Constitution applicable to cities shall be applicable to consolidated governments; and all the provisions applicable to counties shall also be applicable to such consolidated governments, except such as are inconsistent with the provisions of the Constitution applicable to cities or prohibited to cities; which indubitably makes all the provisions of the Constitution which are applicable to cities likewise applicable to consolidated governments, although provisions applicable to counties may also be applicable to such consolidated governments, if not inconsistent with the provisions of the Constitution applicable to cities, or prohibited by it to them. This strikes us as being such a complete answer to the objection above stated as to render it unnecessary to suggest any other.

"Our first conclusion, therefore, is, that the McClure charter, if constitutional, cannot take effect as the corporation known as the City and County of San Francisco, until a majority of the electors of said corporation, voting at a general election, shall so determine.

"On the argument, it was insisted that the consequence of this would be to leave said city and county without any government after the first of next month. This suggestion would be entitled to some weight if the language of the Constitution on this point were so ambiguous as to leave room for doubt as to the intention of its framers. In the absence of any such doubt, however, our decision upon the proper construction of the Constitution cannot be influenced by what may be the consequences of a proper construction. But there is no ground for any alarm. Impliedly the Constitution provides that cities, incorporated previously to its adoption, shall continue to exist under their existing acts of incorporation, until a majority of the electors determine to be organized under general laws, or frame a charter for their own government. The argument that the existing charter must cease after the first of next month, because it is inconsistent with the clause of section 7 of the Constitution, which provides, that 'in consolidated city and county governments of more than one hundred thousand population there shall be two Boards of Supervisors, or Houses of Legislation,' is based upon what we conceive to be a very narrow view of the provisions of the Constitution; because, if the Constitution has provided, as we think it has, by necessary implication, that the present charter shall remain in force and

effect until superseded or supplanted by one framed and adopted in accordance with the provisions of the Constitution, then no provision of the present charter can be justly said to be inconsistent with any provision of the Constitution. The clause relating to two Boards, or Houses of Legislation, has reference to general laws passed or charters framed for the government of cities, subsequently to the adoption of the Constitution. Otherwise, cities previously incorporated might, by the neglect of the Legislature to pass general laws, or of the people to frame charters for their government, be left without any governments after the first of next month. If the existing governments of cities, or of consolidated cities and counties, expire on the first of July, 1880, the framers of the Constitution could not have overlooked the contingency which might arise, by which such municipalities would be wholly without governments after that date. And if they foresaw it, as they must have foreseen it, if it can arise, they would have provided against it. We certainly could not, upon a clause of doubtful meaning, hold that the Convention intentionally or heedlessly paved the way for the introduction of 'disorganization and chaos;' or that it intended to deprive any municipality of all government, unless such municipality should frame a charter for its own government, or organize under general laws,

which might be obnoxious to a majority of its electors, within an unreasonably short period. 'When the Legislature means to invade previously invested rights, to disregard the public interest, and endanger the peace of the commonwealth, its intention must be expressed in terms free from all ambiguity' (Packer v. S. & E. R. Co., 19 Pa. St., 211).

"The conclusion at which we have arrived is that the Act of incorporation of the City and County of San Francisco, commonly known as 'The Consolidation Act,' is within the first, and not within the last clause of section 1 of the Schedule to the Constitution. And we base this conclusion upon what we conceive to have been the intention of the framers of the Constitution, as we gather it from the language of the instrument itself. To us the general intention to emancipate municipalities, as far as it consistently could be done, from the control of the Legislature, is apparent; and we cannot hold that general laws for the government of such municipalities can take effect in any of them until a majority of the electors so determine, without violating not only the spirit, but likewise the plain letter of the Constitution. The intention being clear, it is our duty to give effect to it."

In Desmond vs. Dunn, Mr. Justice Myrick was exceptionally careful in his separate concurring

opinion, to be found on page 253, to point out industriously the situation, so to speak, and indicate the three courses, either one of which might be pursued by the people of the City and County of San Francisco under the then, and now, existing circumstances: *First*, that the City and County of San Francisco could frame and adopt, subject to ratification by the Legislature, a new charter, and which, if ratified and approved, would supersede any existing charter; *second*, that if the Legislature should pass a general law providing for the incorporation, organization and classification, in proportion to the population, of cities and towns, that the people of San Francisco might determine to become organized under such general law whenever a majority of the electors voting at the general election should express their wish so to do; or, *third*, by non-action, that is, by failing to pursue to the end either of the two courses above indicated, they might retain and act under their present charter, known as the "Consolidation Act," except as to such parts as might be in conflict with the Constitution, viz, method of street improvements, and the like.

The City of Nevada is in no different situation to-day than was the City and County of San Francisco when Desmond vs. Dunn was decided, and as the City and County of San Francisco now is.

No new charter has ever been proposed, adopted or ratified by the people of the City of Nevada, and

it has not become organized under any general law by a vote of a majority of its electors, voting at either a general or a special election, and has seemed to be contented, as was the City and County of San Francisco, with its present charter, limited and restricted as it may be, and without all the authority which possibly it might covet.

The case of Desmond vs. Dunn was the only case in which the central point considered was, were the old charters before the adoption of the new Constitution affected by its adoption and declared void, and in that case it was squarely held, and has, we contend, not since been overruled, that the old charters remained in existence until the particular municipality, such as the City of Nevada, might see fit to either adopt a new charter, or elect by popular vote, to become organized under such general law as the Legislature might thereafter see fit to pass.

A general municipal Act was passed in 1883 by the Legislature of the State of California providing for the incorporation, organization and classification, by population, of cities and counties throughout the State, but it will be seen, by reference to the new Constitution and the Act of 1883 and Acts supplemental thereto and amendatory thereof, that such incorporation, organization and classification could only be effected by a popular vote of the particular municipality seeking to

avail itself of the benefits of the Act, and we insist that until the City of Nevada shall, by popular vote, so determine, that the old charter of 1878 must remain intact, and that the power of the Board of Trustees of that City cannot be enlarged by a general law such as the Act of 1889 and the amendatory Acts thereof.

The attention of this Honorable Court is invited to the provisions of the charter of the City of Nevada, wherein it will be seen that the powers of the Board of Trustees were exceedingly limited, and in many places perhaps inadequate to the growing necessities of the City; but the people of the City of Nevada saw fit, whether wisely or not, to insist upon a limitation of these powers, and these were the conditions, and only conditions, upon which they agreed to become incorporated, subject to the approval and consent of the Legislature of the State of California.

This consent and approval was manifested by the passage of the Act of the Legislature of March, 1878, incorporating the City of Nevada, and this Act has remained upon the statute books unimpaired ever since.

If prior to the adoption of the new Constitution in 1880 the people of the City of Nevada had desired that these powers of the Board of Trustees of the City of Nevada should be increased or enlarged they would have been compelled to have

made application to the Legislature of the State of California for such new and enlarged powers, and which, if granted by the Legislature prior to the adoption of the new Constitution, they could have exercised; but, had the Legislature denied it, they could not have exercised any additional powers, other than those originally set out in the charter of 1878.

It is evident that one of the objects of the new Constitution was to provide for local self-government as far as possible.

This was stated by counsel for complainant on the oral argument, and this thought will be found in one of the decisions of the Supreme Court of the State of California in Thomason vs. Ruggles, 69 Cal., 470, where it is said:

"In arriving at a proper conclusion in this case, we labor under the great difficulty of endeavoring to harmonize apparently conflicting provisions of the Constitution. *One idea seems to be prominent in that instrument, that is, local government for local purposes.*"

The people of the State of California, almost exhausted, it may be said, with local bills and special legislation, passed from time to time at protracted sessions of its Legislature, reluctant always to adjourn, saw fit in 1880 to frame and adopt a new Constitution, declaring that a new order of things should thenceforth prevail, and by most stringent

provisions declared that thereafter no special or local legislation should be had, and limited the sessions of the Legislature, so far as the compensation of its members was concerned, at least, to sixty days, which substantially fixed the life of the Legislature at sixty days, as even the patriotism of its members, without compensation, rarely extended it beyond that period.

Had the people of California, in 1880, seen fit to expressly provide in the new Constitution that all previously existing charters of municipalities should cease after a fixed time, we would not now be before this Honorable Court on behalf of the complainant, but this was omitted from the new Constitution, and, as held in Desmond vs. Dunn, all these charters were expressly continued in existence, at least by the strongest implication, until otherwise changed as provided by law.

The incorporation, organization and classification of cities should first have claimed and received the attention of the Legislature which convened after the adoption of the new Constitution, but this was not effectually done until 1883, by the general Municipal Act, providing for such incorporation, organization and classification.

The unquestioned theory of the new Constitution was that all the municipalities of the State should come in under this general law by popular vote of the respective municipalities and become incorporated under this general law.

No general law providing for such incorporation, organization and classification had been passed when Desmond vs. Dunn was decided, and since the passage of the general law, Desmond vs. Dunn has been several times expressly affirmed and recognized by the Supreme Court of this State, and whenever the Court has had opportunity to recognize the principle of this case it has done so in no equivocal terms.

In the case of The People vs. Pond, 89 Cal., 143, Mr. Justice Paterson, speaking for the Court, said:

"The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners, after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners, who claim to have been elected as members of the first Board of Supervisors has been settled adversely to them by the decisions in Desmond vs. Dunn, 55 Cal., 248, 249, and People vs. Board of Election Commissioners, 2 West Coast Rep., 366; and the claim of the others, by the decisions in Staude vs. Board of Election Commissioners, 61 Cal., 313; Heinlen vs. Sullivan, 64 Cal., 378, and People vs. Hammond, 66 Cal., 655. The effect which a deci-

sion overruling those cases would have upon municipal proceedings for over ten years past is so apparent, that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to,—at least so far as the Board of Supervisors is concerned,—even though we should believe that they were based upon an erroneous construction of the provisions involved. And although the rule applies with less force to the case of the Police Commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people."

This decision of Associate Justice Paterson was concurred in by Associate Justices Harrison, De Haven, Garoutte, McFarland and Mr. Chief Justice Beatty.

The repeated efforts of learned counsel throughout the State to break down and destroy Desmond vs. Dunn have, it will be seen, at least up to the present time, been fruitless, and the Supreme Court of California has, perhaps ingeniously, protected itself each time that the question of the relation of a general law to a particular municipality has been before it, and thus we note in Thomason v. Ruggles, 69 Cal., 471, the following observations of the Court:

"It would be a very difficult matter to determine how far a prior existing charter may remain intact in all its provisions, and yet be 'subject to and controlled by general laws.' To illustrate: Suppose a general law were passed that the presiding officer and executive of every municipality in the State should be called the president of the corporation; would the Mayor of the City and County of San Francisco cease to have that title, and be compelled to take on the title of President of the City and County of San Francisco? or could he, under the existing charter, retain his title of mayor?

"*It is not necessary to attempt to lay down a rule in advance of an existing case. It is sufficient to take the case now before us.*"

The methods by which a municipality, existing under an old charter, can relieve itself from its, perhaps, unhappy state, laid down in the separate concurring opinion of Mr. Justice Myrick in Desmond vs. Dunn, were subsequently adopted by the entire Supreme Court, in a later opinion, in the case of People vs. Hammond, 66 Cal., 656.

This last case was one of several cases in which an effort was made to oust the Board of Police Commissioners of the City and County of San Francisco, and which are alike familiar to the Bench and Bar of California. The Board of Police Commissioners were appointed under an Act of

the Legislature of April 1, 1878, prior to the adoption of the new Constitution, and which was practically an amendment to the Consolidation Act of the City and County of San Francisco, and as such has ever since remained the law of this State, and under which a majority of the commission, originally appointed, have continuously held office for a period of upwards of sixteen years, notwithstanding general laws providing for the police control and power of municipalities, and, every time that the question has been before the Supreme Court of the State of California, it has adhered to its earlier decisions, and practically affirmed the case of Desmond vs. Dunn.

Desmond vs. Dunn was referred to in Barton vs. Kalloch, 56 Cal., 104, and Desmond vs. Dunn was cited with approval by Mr. Justice Thornton.

The question of the relation of a municipality under an old charter was again considered in the case of Wood vs. Board of Election Commissioners, 58 Cal., 562, where the Court says:

"It is as clear as language could make it that the present 'City and County of San Francisco is a continuation of the late municipal corporation known as the 'City of San Francisco.' Under the Consolidation Act and the Acts amendatory thereof, it is nothing more nor less than a municipal corporation, and the question whether a general law affects it or not must be solved by rules

which have been established for determining *when a general law does or does not apply to a municipal corporation.*

"Ordinarily, a general law, when it relates to a matter concerning which no provision is made in the charter of a municipal corporation or any special Act relating exclusively thereto, applies to such corporation the same as to any other political subdivision of the State. But '*it is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts* passed for the benefit of particular municipalities' (1 Dill. Mun. Corp., Sec. 87).

"Such repeals are not favored. And it has accordingly been held that where the provisions of a city charter and the general law upon the same subject were conflicting and irreconcilable, the provisions of the former were not repealed by the latter (S. S. Bank vs. Davis, 1 McCarter, 286; State vs. Minton, 1 Dutch, 529; State vs. Clark, Id., 54; Walworth Co. vs. Whitewater, 17 Wis., 193; Janesville vs. Markoe, 18 Id., 350; State vs. Branin, 3 Zab., 484). And a clause in the general statute repealing all Acts and parts of Acts in conflict with it, although sufficiently comprehensive to include any repugnant provision of law wherever found, has been held not to repeal provisions of city charters which were repugnant to such gen-

eral law (Walworth Co. vs. Whitewater, Janesville vs. Markoe, and State vs. Branin, *supra*)."

In this case Desmond vs. Dunn was again referred to, but nowhere overruled, and is cited with approval at the top of page 567 in the decision.

In the case of Staude vs. Election Commissioners, 61 Cal., 320, Judge Ross refers to Desmond vs. Dunn, and says:

"If, therefore, the Legislature has, by a general law, provided for the incorporation, organization and classification, in proportion to population, of cities and towns, or, if not, whenever it shall do so, the City and County of San Francisco may become organized under such general law whenever a majority of its electors voting at a general election shall so determine, and shall organize in conformity therewith. And until a majority of such electors do so determine, the Consolidation Act of the city and county cannot be vacated or abrogated by any general act of incorporation," and cites Desmond vs. Dunn, *supra*.

We thus see that Desmond vs. Dunn, decided as early as 55 California, has never been overruled, but stands as the law of the State of California to-day.

If it be claimed that Desmond vs. Dunn, in any of the decisions, has been in any way modified, it could only be claimed that such modification related to *State matters*.

Indeed, this thought is echoed by Mr. Justice Myrick, in the case of Earle vs. Board of Education, 55 Cal., 495, where he says:

"The Consolidation Act may remain for *municipal* purposes—that is, city and county government —yet the educational department, *as a State matter*, be subject, under the Constitution, to general laws passed for that purpose."

We have no doubt that in all matters touching the general taxation policy of the State of California, and in all matters where the interests of the State of California, as a State or Commonwealth, are affected, that general laws may be passed which may supersede certain clauses of existing charters, or charters existing prior to the adoption of the new Constitution, but this does not belong to that class of cases.

The powers of the Trustees of the City of Nevada were fixed by the charter of its incorporation, and no general law could be passed to enlarge those powers, as contended for by the respondents here.

Notwithstanding the abundant opportunities of the Supreme Court to overrule Desmond vs. Dunn in the many cases in which that case has been cited or referred to, the Supreme Court has not seen fit to vacate or set aside this case and, in the State of California at least, it must be accepted as established law, and until the City of Nevada has

seen fit to frame and adopt a new charter, or to elect by popular vote to incorporate under the general Municipal Act, so often referred to in the argument, the powers of its Board of Trustees must remain as we find them, written in its original charter.

For the reasons herein set forth, it is respectfully urged that the decree entered in the Circuit Court should be set aside, and that the demurrer interposed by respondents and appellees should be overruled.

Respectfully submitted,

RUSSELL J. WILSON,
MOUNTFORD S. WILSON,
Solicitors for Appellant.

P. S.—Since the foregoing brief has been in the hands of the printer, the Supreme Court of California has rendered an elaborate opinion, filed May 20, 1897, in the case entitled P. W. Murphy, Plaintiff and Appellant vs. The City of San Luis Obispo, and others, Defendants, which deals with the whole subject of the issuance of bonds by municipalities, but it is too late to do more than to refer to that case, and to add that, in our judgment, it is determinative of the case at bar in favor of the plaintiff in this action.

No. 356.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Eleanor C. Huntington,

Appellant.

vs.

The City of Nevada et al.

Appellees.

Brief of Respondents and Appellees.

A. D. Mason,
J. M. Walliag,

Solicitors for Respondents and Appellees.

Filed the 18th day of June, 1897.

.....Clerk.

Call City Daily Transcript Print.

No. 356.

In the United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON,

Appellant,

vs.

THE CITY OF NEVADA ET AL.,

Appellees.

Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

BRIEF OF APPELLEES.

The Complainant as a femme sole, filed her Bill in the Circuit Court praying that an injunction be issued enjoining the City of Nevada and its Board of Trustees from proceeding further in the matter of issuing Bonds for the purpose of establishing and constructing water

works for the use of the citizens of the municipality.

Respondents appeared in said action, and filed therein, a general demurrer to Complainant's Bill, on the ground "that the Bill of Complaint herein, does not state facts sufficient to constitute a cause of action against respondents, or either of them."

After hearing in the Circuit Court, Respondents' demurrer was sustained, and Complainant declining to amend, her Bill was dismissed and final decree entered in favor of Respondents.

Thereupon this appeal was taken.

The contention in this case involved but a single question which may be properly stated as follows: Has the City of Nevada the authority to issue the Bonds referred to in Complainant's Bill, for the purpose of erecting and constructing water works to be owned by the municipality?

Appellant contends that the City has no such authority, while Appellees maintain that it possesses the authority to issue and sell the bonds referred to, under and by virtue of the provisions of the Act of the Legislature of the State of California entitled, "An Act authorizing the incurring of indebtedness by Cities, Towns and Municipal Corporations, incorporated un-

der the laws of this State," Approved March 19th, 1889, and amendments thereof, approved March 11th, 1891, March 19th, 1891, and March 1st, 1893.

In support of the Contention of Appellant, she seems to rely upon the case of Desmond vs. Dunn, 55 Cal. 243, and on the case of P. W. Murphy vs. the City of San Luis Obispo, et al., decided May 20th, 1897, by the Supreme Court of the State of California, reported in "California Decisions" of date May 26th, 1897, being volume 13, No. 811.

This case, Desmond vs. Dunn, arose under the McClure Charter to San Francisco. The Supreme Court seem to hold that Charters adopted prior to the new Constitution are not subject to be controlled by general laws. That Section 6 of Article 11 of the Constitution of 1879, applies only to Charters framed under the new Constitution. The Charters framed prior thereto remain in force until changed by the mode prescribed thereby.

The above case, Desmond vs. Dunn, has been frequently cited since it was decided by the Supreme Court of this State, viz: Earl vs. San Francisco Board of Education, 55 Cal. 495, in the concurring opinion of Judge Myrick. In this case it was held by the Supreme Court that the

educational department would be subject under the Constitution, to general laws passed for that purpose.

In the case of Barton vs. Kallock et al., 55 Cal. 104, the case is cited as authority that the election of the officers of San Francisco, is not required by law to be held in 1880, under General laws.

In Wood vs. Election Commissioners, 58 Cal., 569, the case of Desmond vs. Dunn is cited to the point: that the Consolidation Act of San Francisco cannot be vacated by any general act of incorporation, until a majority of electors determine to organize under it, but the City is not free from legislative control, and is subject to general laws so far as elections are concerned.

The case is again cited in the case of Donohoe vs. Graham, 61 Cal., 281. This case decided that the street law of San Francisco of 1872 was inconsistent with the Constitution of 1879 and therefore superseded.

The case of Desmond vs. Dunn is cited in the dissenting opinion of McKinstry, Justice.

In the case of Staude vs. Election Commissioners, 61 Cal., 320, Desmond vs. Dunn was relied upon, and the Supreme Court held that "whether the City and County elects to organize under such general laws or to continue its existence under the Consolidation Act, it

is subject to and controlled by general laws; for in the same section of the Constitution, in which the then existing City and Town organizations are recognized, and the continuance of their existing charters permitted, it is declared that "CITIES OR TOWNS HERETOFORE OR HEREAFTER ORGANIZED AND ALL CHARTERS THEREOF FRAMED OR ADOPTED BY AUTHORITY OF THIS CONSTITUTION, SHALL BE SUBJECT TO AND CONTROLLED BY GENERAL LAWS." The framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the rights to organize under a general act of Incorporation, which the Legislature was directed to pass, or to continue their existence under their existing charters as they might elect, they nevertheless said that whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws—such general laws as should be passed by the Legislature, other than those for the "incorporation, organization and classification of cities and towns."

In the case of In Re Carrillo, 66 Cal., 5, Desmond vs. Dunn is cited to the point that the Charter of the City of San Jose of 1874 remained in force, regardless of the adoption of the Constitution of 1879, and the Legislative Acts of 1880, relative to Courts of Justice, etc., as there was no showing that a Police Judge had

been elected, but "the City itself and the Charter of the City were therefore subject to the provisions of the General Laws of 1880."

Desmond vs. Dunn again came before the Supreme Court in the case In Re Guerrero, 69 Cal., 100. The same question was presented in this case as in 66 Cal., 5, Supra, as to Judicial officers. The real question was as to the validity of a liquor license ordinance.

In the case of Thomasson vs. Ashworth, 73 Cal., 73, Desmond vs. Dunn was again cited. This case holds that general laws as to street work control the Charter of San Francisco of 1872, that corporations are subject to general laws.

Again, in the case of City of Stockton vs. Insurance Company, 73 Cal., 624, the Court says:

"We do not mean to imply that the Legislature, even by a general law, can substitute an entirely new Charter for an old one without the consent of the people of the locality. To that extent, we understand the decision in Desmond vs. Dunn, (Supra) to be the law." This case related to a municipal tax.

In People vs. Pond, 89 Cal., 143, Desmond vs. Dunn is cited as authority that City Charter controlled, as no election has been had to change the same. This was the case of an application for a writ of Mandate to com-

pel the Registrar and Election Commissioners to count certain votes for certain persons as Police Commissioners.

Appellant contends that Desmond vs. Dunn is still recognized as law by the Supreme Court of the State of California. To a limited extent, we think that this contention is correct, but an examination of the cases cited wherein Desmond vs. Dunn has been commented upon, leads to the couclusion that it is law only in so far as it holds that general laws passed by the Legislature changing the "Incorporation, organization and classification" of cities and towns do not supersede the provisions of the Charters of such cities and towns, but that in all other matters, except incorporation, organization and classification, the Charters of cities and towns, whether enacted before or subsequent to the adoption of the Constitution of 1879, are subject to be controlled by general laws.

If our contention as to the true construction to be placed upon Desmond vs. Dunn is correct, then we submit that instead of that case being an authority in favor of Appellants position, viz: that the City of Nevada cannot incur an indebtedness in excess of $2,000, because its Charter, approved in 1878, prohibited its Board of Trustees from incurring any indebtedness which should exceed $2,000, it clearly is an authority holding that in all matters except those of incorpora-

tion, organization and classification, the City is controlled by and subject to the provisions of general laws passed by the Legislature for the government of cities and towns, regardless of whether the City was organized prior or subsequent to the adoption of the Constitution of 1879.

The provision of the Charter of the City of Nevada, which Appellant claims limits the authority of the Board of Trustees and of the City to incur an indebtedness, is set out in the Bill of Complaint herein as follows: "Said Board of Trustees shall not contract any liabilities, either by borrowing money, loaning the credit of the City or contracting debts, which, singly or in the aggregate, shall exceed the sum of $2,000." (See Trans., Page 21.)

Appellees contend that this provision of the Charter, even if a limitation upon the power of the Board of Trustees, in their capacity as such, that it is not a limitation upon the power of the City to incur an indebtednes s where such indebtedness is incurred by a vote of the citizens, qualified electors of such municipality.

It was no doubt a wise provision so far as limiting the authority of the Board of Trustees to contract debts on behalf of the City, but it seems to us clear it is a forced construction, to hold that by reason of

the provision above quoted, the voters of the City could not, in accordance with general law, contract a greater debt.

Indeed, we think, that instead of being a limitation upon the power of the City, as such to contract debts, in accordance with the provisions of general laws, it was a clear delegation of authority to the Trustees to contract debts on behalf of the City to an amount not exceeding $2,000 without being under the necessity of submitting the question of the incurring of such indebtedness to the voters.

At the close of Appellant's brief, and as a P. S., Appellant says: "Since the foregoing brief has been in the hands of the printer, the Supreme Court of California has rendered an elaborate opinion, filed May 20th, 1897, in the case entitled P. W. Murphy, Plaintiff and Appellant vs. the City of San Luis Obispo et al., Defendants, which deals with the whole subject of the issuance of bonds of municipalities, * * * * and, in our judgment, it is determinative of the case at bar in favor of the Plaintiff in this action."

An examination of the case will show that there were but three grounds of attack upon the bonds in question in that case, and the Commissioner who wrote the opinion has clearly stated the points involved as follows: "First: That the bonds are made payable in

"Gold Coin of the United States," instead of 'Gold Coin or lawful money of the United States.' Second: That the question as to whether the interest on the bonds would be payable annually or semi-annually, was not submitted to the voters. Third: That the voters voting for said bonds voted by stamping a cross opposite the proposition submitted to them, instead of indicating their wish by writing 'Yes' or 'No' opposite the proposition they desired to vote for."

We are almost tempted to conclude that Counsel for Appellant was misinformed as to this case. As we read the opinion, it nowhere attempts to deal with the question of whether or not general laws control the provisions of the Charter of Incorporated cities or towns.

Indeed, the clear effect of this decision is to hold that a general law passed by the Legislature in 1889 was controlling as to the method to be pursued in elections held for the purpose of bonding a municipality.

It will be observed that the same Act provided that the Legislative branch of the City should, by ordinance, "fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness; such elections shall be held as provided by law for holding

such elections in such city, town or municipal corporation."

The Supreme Court held that the provisions of the Charter as to the method and manner of holding such elections controlled, because the Statute of 1889 provided that such Charter provisions should control.

Again, we call attention of the Court to the fact that the Charter of San Luis Obispo was adopted in 1884, under the general incorporation law of 1883, and as is evident from the opinion provided the method to be pursued in voting at City elections.

In the case at bar, no question is presented analagous to any one of the three propositions involved in the case of Murphy vs. the City of San Luis Obispo.

That, *all municipal corporations are subject to the will of the Legislature*, and liable to be controlled by general law, will be found supported by a very large array of authorities, a few of which we cite, as well as by the provisions of the Constitution itself.

Section 6, Article 11, of the Constitution provides: "*And cities and towns heretofore or hereafter organized and all Charters thereof, framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.*"

Prior to the adoption of the Amendment of November 3d, 1896, the above was the reading of Section 6, so far as quoted.

Section 12, Article 11, reads as follows: "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, *but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.*"

In the language of the Supreme Court of the State of California in the case of Staude vs. Election Commissioners, 61 Cal., 320, Supra, "the framers of the instrument meant something when they inserted this language in it, and we are not at liberty to hold that they did not mean what they said."

The language is plain and unambiguous, expressly declaring that all cities and towns are subject to general laws, and that all cities or towns might be empowered by the Legislature to levy and collect taxes for municipal purposes. This the Legislature have done, and by the Acts approved March 19th, 1889, and the Acts amendatory thereof, and it is admitted that in this case the Board of Trustees of the City of Nevada have com

plied in all particulars with the provisions of said respective Acts.

In the case of Rice vs. Board of Trustees, 107 Cal., 398, the question of the right of the town of Haywards to incur an indebtedness in excess of the amount of the annual tax levy was before the Supreme Court. In that case, the Supreme Court held that the Municipal Indebtedness Act of 1889 is controlling in the cases provided for therein. In speaking of the Municipal Indebtedness Act of 1889, the Supreme Court says: "*That Act is a general Act, and makes provision for just such contingencies as that confronting the authorities of the town of Haywards in this instance.*"

In the case of the People vs. Henshaw, 76 Cal. 436, the Supreme Court said: "The decision of this Court in Thomasson vs. Ashworth, 73 Cal., 73, renders it unnecessary for us to dwell upon the question of the right of the Legislature to pass general laws affecting municipal corporations without reference to whether such corporations were formed before or after the Constitution of 1879."

At the time of the rendition of this decision, the City of Oakland was existing under an Incorporation Act approved March 25th., 1854, and therefore prior to the adoption of the present Constitution.

In the case of Thomasson vs. Ashworth, 73 Cal., 73,

the Supreme Court directly passed on Section 6, Article 11 of the Constitution, and held that the Legislature has power to pass a general law affecting the Charter of the City and County of San Francisco, *without the consent of such City and County.*

In the case of Santa Cruz vs. Enright, 95 Cal. 105, the Supreme Court says: "It may be conceded for the purposes of this decision, that the Charter of the City of Santa Cruz confers no authority upon the municipal authorities to condemn water for the use of the inhabitants of the City. Its warrant for the exercise of the power is found in the Constitution and general laws of the State. Section 6 of Article 11 of the Constitution provides that "cities or towns heretofore or hereafter organized, and all Charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."

And again, on page 112, the Court says: "And the Act of March 19th, 1889, which is also a general law, provides how indebtedness for such works may be secured and paid by municipal corporations."

By reference to California Blue Book for 1895, page 278, it will be found that Santa Cruz was Incorporated by Special Act of the Legislature in 1876.

And in the same case it is held that certain Sections of

the Code of Civil Procedure and the Civil Code are "general laws applicable to municipal corporations which were formed before, as well as to those which were formed after the adoption of the Constitution of 1879."

If the Code Sections cited by the Supreme Court in this case apply to corporations whose Charters had been granted prior to the adoption of the Constitution of 1879, it is difficult to understand why a general law adopted by the Legislature in 1889, is not also applicable to such corporations.

In the case of In Re Wetmore, 99 Cal. 146, the Supreme Court declare that "the provisions of the Act of March 19th, 1889, are general in their character, and give to every municipal corporation incorporated under the laws of this State, the power to create a bonded indebtedness for any of the purposes authorized by the Act."

In the case of Davies vs. The City of Los Angeles, 86 Cal., and on page 41, after quoting that portion of Section 6, Article 11, of our Constitution hereinbefore recited, the Court says: "The language of this latter Section is plain and unambiguous and cannot be explained away by any reasoning, however ingenious."

See also Derby vs. City of Modesto, 104 Cal. 515.

That all municipal corporations are subject to the

will of the Legislature, (see also Dillon on Mun. Cor., Secs. 52, 80.)

The City of Nevada is a public or municipal corporation.

"A municipal corporation is but a branch of the State Government, and is established for the purpose of aiding the Legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the Legislature to determine the extent to which it will confer upon such corporation, any power to aid it in the discharge of the obligation which the Constitution has imposed upon itself." Harrison, Judge, In Re. Wetmore, 99 Cal., 150.

"The Charter or Incorporating Act of a municipal corporation is in no sense a contract between the State and the corporation." 1 Dill. Mun. Cor. Sec. 54, 3d Ed.

Notwithstanding this, the learned Counsel for Appellant contend that this public corporation is not subject to the control of the Legislature which created it. That because it was incorporated prior to 1879—the new Constitution's adoption—it has passed beyond Legislative control and its Charter fixes its authority, franchises and powers, and is in fact the alpha and omega thereof.

(See Appellant's Br., Pg. 3, 4 and 23).

Not only this, but necessarily then, all the other municipal corporations of this State incorporated prior to 1879, occupy this anomalous position, and are beyond Legislative control. "They must disincorporate and their citizens elect to re-incorporate under the general Municipal Act of 1883" or else the Legislature has no control or power over them. (See Page 4, Applt's Brief).

One proposition, we submit, is clear and beyond question, viz: that if the Legislature possesses any power or authority over this class of municipal corporations, if it may enlarge, contract or abrogate their corporate powers, it must do so by a general law and not by a Special Act. (See Cal. Con. Art IV, Sec. 25, and many of the above cases.)

As it is said by McFarland, Justice, in one of the late cases cited ante, this Constitutional inhibitation against special legislation is so broad as to almost cover all subjects of legislation. If the Legislature then is invested with such sower, it could only exercise it through general laws. Had the Legislature such power?

Says Dillon: "In the language of Chief Justice Marshall, when the whole interests and franchises are the exclusive property and dominion of the Government it-

self, such as quasi corporations, (so called), counties and towns or cities, upon which are conferred the powers of local adminstration, there are public corporations. *The power of the Legislature over such corporations is supreme and transcendent;* it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." 1 Dill. Mun. Cor., Sec. 54, post.

See Note 2, Sec. 54, Dill. Mun. Cor., and in People vs. Morris, 13 Wend. 325, where the defendant insisted that the rights and privileges conferred upon a city by the Act incorporating it were vested, and could not be impaired by subsequent legislation. Nelson, Judge, said: "It is an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right against the Government in any individual or body of men."

"A municipal corporation in which is invested some portion of the admistration of the Government, may be changed *at the will* of the Legislature.

Per McLean, J., 16, U. S. 369:

"The special powers conferred upon them are not vested rights as against the State, but being only political, exist only during the will of the general Legislature; otherwise, there would be numberless petty Gov-

ernments existing within the State and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the Legislature, either by a general law operating upon the whole State, or by a special Act altering the powers of the corporation. It may enlarge or contract its powers or destroy its existence."

End of Note 2: "Since the Legislature cannot alienate any part of its legislative power, it cannot therefore by legislative act or contract, invest any municipal corporation with an irrevocable franchise of government over any part of its territory."

Yet, as seen, the learned Counsel claim that by the Act of incorporation, the Legislature has so irrevocably fixed the powers of the City of Nevada, that it cannot enlarge or contract such powers by any legislation whatever; Nevada City is outside the pale of the law until she surrenders her Charter.

As to absolute "legislative control to create, change, modify or destroy the powers of public corporations." See also 15 A. & E. Enc. of Law, Page 976, Sec VI and notes.

The law in question, called the "Municipal Improvement Law," has repeatedly been before the California Supreme Court, and that Court has thus construed it,

per Harrison, Judge, In Re Wetmore, 99 Cal. 150.

"The provisions of the Act of March 19th, 1887, are general in their character, and give to every municipal corporation incorporated under the laws of this State, the power to create a bonded indebtedness for any of the purposes authorized by the Act."

The words are spoken ex-cathedra in construing the Act, and determining to what it relates. A cursory read ing of this case will show the fallacy of the narrow construction placed on this Act by opposing Counsel.

See also, 104 Cal. 515, Derby vs. City of Modesto.

91 Cal. 549, City of San Luis Obispo vs. Haskin.

"Every municipal corporation," etc., means the old as well as the new.

Skinner vs. City of Santa Rosa, 107 Cal., 464, was a case in which the Defendant City was incorporated even before Appellee, viz: 1872; yet the applicability of this law to that city is not questioned. Many other of the authorities cited are decisions upon this law, some under Charters before, others after the New Constitution, and in every one it appears that the Supreme Court construes this Act as general and applicable to all cities.

Thus see, City of Santa Cruz vs. Enright, 95 Cal., 105.

Santa Cruz was incorporated in 1876. Read page 112, last sentence of first paragraph, and cases before cited.

Among the enumerated powers conferred upon the Trustees of the City of Nevada, by its Act or Incorporation, by the terms of Subdivision 20 of Section 8, is the following: "To provide for supplying the City with water and regulate the sale and distribution thereof, provided that this provision shall in no manner alter or affect any contract or contracts heretofore made with any parties or corporation for supplying of said City or any part thereof, with water, but all such contracts shall be and remain in full force and virtue."

By the Charter, power is given to the Board of Trustees to provide for supplying the City with water, and under the Act of 1889, and Acts amendatory thereof, the method of procedure is provided, and no claim is made in this case but what the Trustees have fully complied with the provisions of such Acts.

In the case of Ellenwood vs. City of Reedsburg, 64 N. W., Rep. 885, the Supreme Court of Wisconsin says: "Revised Statutes, Section 942, provides that any city may issue its bonds for the erection of water works

or to accomplish any other purpose within its lawful power. The Reedsburg City Charter, (Section 1), provides that it shall have the powers possessed under the general Statutes. Sections 119 and 129 provide that the City shall contract no debts exceeding the revenues of the Fiscal year, except as expressly authorized by Charter. Held, that the City had power to issue bonds in the manner provided by law, for the erection of water works and an electric light plant."

Rules of Construction of State Statutes.

U. S. Courts are bound by the decisions of the State Supreme Court as to the construction of Statutes of the State.

Hancock vs. Louisville & N. R. Co., 145 U. S., 409.

Pullman Car Co. vs. Penn., 141 U. S., 18.

The greater part of Appellant's Brief is devoted to the proposition that Desmond vs. Dunn lays down the doctrine that a municipal corporation organized under the old Constitution is not subject to be controlled by general laws passed thereafter. This doctrine it seems to us is clearly overruled and repudiated by the Supreme Court of this State, and that no further citation of authorities on that point is necessary. The later

cases clearly lay down the law that all municipal corporations, being the creatures of the Legislature, are subject to be controlled by general laws passed, except as to the three matters of *organization, incorporation* and *classification.*

As the Act of 1889 did not purport to affect and does not affect the corporation Act of the City of Nevada, in either of these particulars, we submit that it is controlling, and the Acts of the City Trustees, Respondent, valid and legal.

That the Legislature intended the Act of 1889 to relate to all cities, the following quotations therefrom will show, viz: Sec 1. "Any city." Sec 2: "Any city." Sec. 3. "Any municipality." Sec 7. "The Legislative branch of any city, etc." Sec. 9. "Every city, town, etc." Sec. 11. "Any municipality." These excerps clearly show the intention of the Legislature to make this Act applicable to all cities.

Counsel, however, seem to think the Legislature did not mean, and further, did not have the right to affect Charter provisions by said Act. The first of these propositions is answered by the Act itself. Thus Section 12 provides (after expressly repealing certain municipal improvement Acts therefore passed) "*And all general acts or special acts or parts of Acts conflicting with this Act are hereby repealed.*"

To what do the words "*special acts refer*" if not to Charters?

The citation made by opposing counsel, viz: 1 Dill. Mun. Cor., Sec 87, shows that the Legislature may, by a general law, repeal Charter provisions.

That the cases before cited, and the law generally clearly establishes the principle, that municipal corporations are the creatures of the Legislature, may be controlled after the incorporation by general laws, we think is too clear to require further recitation of authorities. The case at bar, however, does not even go that far; the Charter delegates to the City of Nevada certain enumerated powers, among which is the power "to provide for supplying the City with water." Is power so delegated meaningless, as it would be, if the only power here given, was restricted or bounded by the annual income, or by the provision that the Trustees could not incur indebtedness exceeding $2000?

Even if it be admitted that the limitation contained in the City Charter prior to the passage of the Act of 1889 and the amendments thereto, was a clear limitation upon the right of the City, by vote or otherwise, to incur a municipal indebtedness, yet our contention is that as the Legislature, by the Act of 1889, has provided that *any city* may incur an indebtedness up to one-fifteenth of the assessed value of all its property,

for public improvements, etc., that such Act, being the last expression of the Legislative will, must control.

The question at issue in this case is not, what are the powers of the City, but, has the Legislature the power by general law to confer upon the municipal corporations organized prior to the adoption of the new Constitution, additional powers to those included in their Charter ?

Section 6 of Article 11, of the Constitution, expressly declares that "all municipal corporations are subject to general laws ?

It is elementary that the Constitution of the State is not a delegation of powers, but a limitation, and in so far as the Legislature is not inhibited by the Constitution of the State or of the United States, it possesses supreme power over all matters of legislation.

A consideration of the provision of the Charter, and of the Act of 1889, and Acts amendatory thereof, will readily show that they are not in conflict with each other. The Charter of the City limited the rights of the *Trustees* to incur an indebtedness over the sum of $2000, while the Act of 1889 enlarged that right for certain purposes and conferred upon the *City* the right to incur an indebtedness for the purposes therein men-

tioned, in the manner therein provided, of any amount not exceeding one-fifteenth of its assessed valuation.

It would seem to follow as a necessary conclusion that if the Legislature had a right to restrict the corporation in the matter of incurring indebtedness, it possesses the right to enlarge that restriction.

We concede that so far as the *incorporation, organization and classification* of cities are concerned the power of the Legislature to affect them in these particulars is limited by the Constitution, but not otherwise, except that its power must be exerted by the passage of general laws.

To hold that the Act of 1889 is a general law, and in the same breath to insist that it does not apply to all municipal corporations, would seem illogical.

Counsel for Plaintiff contend that by reason of the provisions of the General Municipal Act of 1883 and of the Constitution, municipal corporations can only be affected as to their incorporation, organization and classification by a popular vote of the particular municipality, and then insist that unless the City of Nevada shall, by a popular vote, reorganize under the General Municipal Act of 1883, the old Charter of 1878 must remain intact, and that the power of the Board of Trustees of the City or of the municipality cannot be en-

larged by a general law such as the Act of 1889 and the Acts amendatory thereof.

The fallacy, as it seems to us, of the argument presented is, that the Act of 1889, authorizing the incurring of municipal indebtedness, for the purposes therein enumerated, does not, in any sense, interfere with the *incorporation, organization and classification* of a city. Indeed, Counsel do not claim that the Act of 1889 affect municipal corporations in these particulars. If it does not, then clearly no inhibition has been pointed out against the power of the Legislature in passing the Act of 1889 and making it applicable to all municipal corporations. It is an elementary rule applicable to all municipal corporations, that they possess all such powers as is necessary to carry into effect the objects of their formation, except in so far as they are limited by the provisions of their Charters or by Acts of the Legislature.

It is also elementary that an Act of the Legislature of one Session is not controlling or binding upon subsequent Legislatures. Such former Acts may be amended, enlarged or wholly repealed, so long as the Legislature is not, itself, incapacitated by some Constitutional provision.

Applying the foregoing rules to this case it seems clear that it must be held that while the Legislature of

1878 had a right to limit the incurring of indebtedness by the City of Nevada, the Legislature of 1889 and subsequent Legislatures had an equal right to enlarge the powers of the City in that direction.

Counsel for Complainant cites the case of the People vs. Pond, 89 Cal., Page 141, in support of their contention in this case. We submit that a most casual reading of that case will show that it has no application here. There the contention was that the Consolidation Act of the City and County of San Francisco had been changed by a general law. The Supreme Court determined simply that the incorporation and organization of the city could not be changed by a general law of the Legislature, but that it required a vote of the people. No such question is presented here.

The Complainant alleges in her Bill that she is "a tax-payer and owner of property in the City of Nevada," but the value of the property or the amount of taxes paid does not appear. See Trans. 3.

Again, on page 23, Trans., it is averred that the acts of the Trustees "will greatly affect the market value of the property of your Oratrix * * * and subject (the same) to said special tax, and that she will thereby be irreparably damaged." Nowhere in the Complaint does the market or other value of the property of the

Oratrix, or the amount of taxes which she will be obliged to pay, appear—nor does she claim she had any franchise or contract which will be violated.

Complainant also avers "that said City of Nevada * * * are already furnished and supplied with pure, fresh water * * *; that the interests of said City of Nevada * * * do not require the incurring of said indebtedness."

The question of whether the public health or comfort requires a water supply cannot be determined by private citizens.

St. Tammany Water Works Co. vs. New Orleans. 120 U. S., 64.

Appellant has specified 14 assignments of error. By stipulation of Counsel filed in this case, Assignment No. VII. is waived. As all other errors are predicated upon a single proposition, viz: that the City has no power to issue the bonds in question here, we do not deem it necessary to reply to each separately.

In conclusion we submit that the decree of the Circuit Court should be affirmed.

A. D. MASON,
J. M. WALLING,
Solicitors for Appellees.

No. 357.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MAX ENDELMAN and EDWARD LORD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the District Court of the United States for the District of Alaska.

INDEX.

United States,
District of Alaska. } ss.

Pleas and proceedings begun and held in the District Court of the United States for the District of Alaska at the adjourned November term, 1896.

Present: The Honorable ARTHUR K. DELANEY, Judge.

THE UNITED STATES OF AMERICA, DISTRICT OF ALASKA.

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA,

vs.

MAX ENDLEMAN and EDWARD LORD.

23 U. S. Statutes at Large, Chapter 53, Section 14.

Indictment.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand

eight hundred and ninety-six, begun and held at Juneau, in said District, commencing on the 9th day of November, 1896.

The Grand Jurors of the United States of America, selected, impaneled, sworn, and charged within and for the District of Alaska, accuse Max Endleman and Edward Lord by this indictment of the crime of unlawfully selling intoxicating liquors within said district, committed as follows:

The said Max Endleman and Edward Lord at or near Juneau within the said District of Alaska, and within the jurisdiction of this Court, on or about the 7th day of December, in the year of our Lord one thousand eight hundred and ninety-six, and at divers other times before, did unlawfully and willfully sell to John Doe and Richard Roe and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor, called whisky, to-wit, one glass, pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors aforesaid unknown, without having first complied with the law concerning the sale of intoxicating liquors in the District of Alaska.

And so the Grand Jurors duly selected impaneled, sworn, and charged as aforesaid upon their oaths do say, that Max Endleman and Edward Lord did then and there unlawfully sell intoxicating liquors in the manner and form aforesaid to the said John Doe and Richard Roe, and to divers other persons, whose real names are to the

Grand Jurors aforesaid unknown, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

BURTON E. BENNETT,
United States District Attorney.

[Endorsed]: No. 612. United States of America vs. Max Endleman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. A true bill. Edward de Groff, Foreman of Grand Jury. Witnesses examined before the Grand Jury: C. W. Young, Karl Koehler, Fred Heyde, S. M. Graf. Filed Dec. 8, 1896. Charles D. Rogers, Clerk. Burton E. Bennett, U. S. Attorney.

And afterwards, to-wit, on the 8th day of December, 1896, a bench warrant was issued which is in words and figures following, to-wit:

Bench Warrant.

United States of America,
District of Alaska. } ss.

The President of the United States of America, to the Marshal of our District of Alaska or his Deputy, Greeting:

Whereas, at a District Court of the United States for the District of Alaska, holden at the city of Juneau, on

the 9 day of November, 1896, the Grand Jurors in and for said district found a true bill of indictment against Max Endleman and Edward Lord for the crime of unlawfully selling intoxicating liquors in the district of Alaska, against the form of the Statutes of the United States in such cases made and provided, as by the said indictment now remaining on file, and of record in said court more fully appears. Now, therefore, you are hereby commanded to forthwith apprehend the said Max Endleman and Edward Lord if they may be found in your district, and them bring before the said Court, at the courtrooms thereof, in the city of Juneau, to answer the indictment aforesaid.

Hereof fail not; and make due return of this writ with your doings thereon, into our said court.

Witness, the Honorable ARTHUR K. DELANEY Judge of said District Court, and the seal thereof affixed this 8 day of December, A. D. 1896.

[Seal] CHARLES D. ROGERS,
Clerk.
By Walton D. McNair,
Deputy.

United States of America,
District of Alaska. } ss.

In obedience to the within warrant I have the body of the said Max Endleman and Edward Lord before the

Honorable District Court of the United States for the District of Alaska, this 8 day of December, 1896.

LOUIS L. WILLIAMS,
Marshal.

By William M. Hale,
Deputy.

[Endorsed]: U. S. District Court, District of Alaska. No. 612. The United States vs. Max Endleman and Edward Lord. Bench warrant. The defendant to be admitted to bail in the sum of ——— dollars. ————, Clerk. Returned and filed Dec. 8, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on the 9th day of December, 1896, the following further proceedings were had and appear of record in said cause to-wit:

UNITED STATES,
Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD,
Defendants.

No. 612.

Arraignment.

Now, at this day comes the plaintiff by Burton E. Bennett, United States Attorney, and the defendants being

personally present, and their counsel, C. S. Blackett, Esq., and upon arraignment waive the reading of the indictment, and upon request of counsel are given until Thursday, December 10, 1896, at 10 o'clock A. M. to plead to the indictment.

And afterwards, to-wit, on December 10, 1896, defendants filed their motion to quash, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

United States of America, } ss.
District of Alaska. }

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD,
Defendants.

23 U. S. Statutes at Large, Chapter 53, Section 14.

Motion to Quash Indictment.

Comes now the above-named defendants and move the Court to quash the indictment returned against them, No. 612, upon the following grounds:

1. That two or more offenses are charged in the same count and same indictment.

2. That the indictment is fatally defective for duplicity.

3. That two or more offenses are charged in the same indictment in the same count against two defendants without segregating the offenses committed by each defendant.

4. That the indictment is too vague, indefinite, and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defense.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendants' Attorneys.

I, Max Endleman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action, and that the foregoing motion to quash is true as I verily believe.

Subscribed and sworn to before me this —— day of December, 1896.

——— ————,
Notary Public for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska, U. S. of America, Plaintiff, vs. Max Endleman and Edward Lord, Defendants. Motion to quash. Filed Dec. 10, 1896. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on December 12, 1896, the following proceedings were had and appear of record in said cause to-wit:

UNITED STATES, Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD, Defendants. } No. 612.

Order Denying Motion to Quash Indictment.

Now, at this day comes the plaintiff by Burton E. Bennett, U. S. Attorney, and the defendants by their attorneys, and the motion to quash the indictment coming on to be heard and being argued by counsel, and the Court being sufficiently advised in the premises, denies said motion, to which ruling the defendants now except.

And afterwards, to-wit, on said December 12, 1896, defendants filed a demurrer, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Demurrer to Indictment.

Comes now the above-named defendants and demur to the indictment rendered against them in the above-entitled court and cause upon the following grounds, to-wit:

1. That the Court has no jurisdiction over the subject matter of the action.

2. That more than one crime is charged in the indictment against the defendants in the same count.

3. That the facts stated in the indictment do not constitute a crime, or any crime, against the defendants, or either of them.

CREWS, HANNUM & IVEY,
Defendants' Attorneys.

I, Max Endleman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants

in the above-entitled action; and that the foregoing demurrer is true as I verily believe.

Subscribed and sworn to before me this —— day of December, 1896.

——— ————,
Notary Public for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. U. S. of America, Plaintiff, vs. Max Endleman and Edward Lord, Defendants. Demurrer. Filed Dec. 12, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Order Overruling Demurrer.

The demurrer filed herein coming on to be heard, and the Court being fully advised in the premises, overrules said demurrer, to which ruling defendants now except.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
} No. 612.

Plea.

Now, at this day comes the plaintiff by Burton E. Bennett, United States Attorney, and the defendants each being personally present, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, enter a plea of not guilty to the indictment.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Trial.

This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally present in court, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, the venire of the petit jury was called by the clerk, and the same being exhausted and the requisite number of qualified jurors not having been obtained, it is ordered that this cause be continued until Monday, December 14, 1896, at 10 o'clock A. M.

And afterwards, to-wit, on December 14, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

Plaintiff,

vs.

No. 612.

MAX ENDLEMAN and EDWARD LORD,

Defendants.

Trial (Continued).

Come again the parties hereto, the plaintiff appearing by Burton E. Bennett, U. S. Attorney, and each of the defendants being personally present, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, the clerk proceeded to call the special venire of the petit jury, and the jurors being sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues:

Nicholas Bolshanin,	J. T. Yager,
Peter Callsen,	Frank Howard,
Pete Skogland,	J. J. Rutledge,
John McCormick,	W. D. McLeod,
Wm. Wilheim,	Chas. Boyle,
James G. Smith,	Oscar Cling.

The evidence being heard, the cause being argued by

counsel, the jury was charged by the Court, and retired for deliberation in charge of a sworn officer.

And afterwards, to-wit, on December 15, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Trial (Continued).

Comes again the plaintiff by Burton E. Bennett, United States Attorney, and the defendants by their attorneys, as also come the jury heretofore impaneled and sworn herein, in charge of their sworn bailiff, and being called by the clerk, under the direction of the Court, and all answering to their names, and report to the Court that they are unable to agree upon a verdict.

Whereupon it is ordered by the Court that they be discharged from further service in this cause.

And afterwards, to-wit, on December 17, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD, Defendants.

No. 612.

Rehearing.

Now, at this day this cause coming on for a rehearing, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally present and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., the venire of the petit jury was called by the clerk, and the jurors sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues:

Charles Clapp.	Neil McLeod.
Louis Levy.	Jo. Edmonds.
John Williams.	J. F. Bodwell.
J. K. Clark.	L. A. Moore.
John Myers.	W. R. Murdock.
W. C. Meydenbauer.	Adam Corbus.

The evidence being heard, the cause being argued by counsel, the jury was charged by the Court, and retired for deliberation in charge of a sworn officer.

The jury in the above-entitled cause having come into court, and being called by the clerk, and all answering, the plaintiff being represented by Burton E. Bennett, U. S. Attorney, the defendants being personally present and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., the jury returned the following verdict:

THE UNITED STATES OF AMERICA, DISTRICT OF ALASKA.

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA,

vs.

MAX ENDLEMAN and EDWARD LORD.

Adjourned November Term, 1896.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant Max Endleman guilty as charged in the indictment, and Edward Lord not guilty.

A. W. CORBUS,
Foreman.

[Endorsed]: No. 612. United States of America vs. Max Endleman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. Verdict. Filed December 17, 1896. Charles D. Rogers, Clerk.

Whereupon the jury are discharged by the Court from further attendance in this cause.

Order Releasing Defendant Edward Lord.

The jury in the above-entitled cause having returned a verdict of not guilty as to the defendant Edward Lord, it is ordered by the Court that he be discharged from custody, and go hence without day.

UNITED STATES,
vs.
MAX ENDLEMAN and EDWARD LORD. } No. 612.

Charge to the Jury.

Gentlemen of the Jury, the Act of Congress provided a civil government for this territory, which is commonly known here as the Organic Act, and which became a law on the 17th day of May, 1884, and has established the government that we have up here in this country, prohibits by expressed enactment the importation, manufacture, and sale of intoxicating liquors in this district.

The indictment in this case charges the defendants, Max Endelman and Mr. Lord, with having violated this provision of the law. It is not for you to pass upon the sufficiency of that indictment; that is entirely for the Court, and the Court instructs you that within the alle-

gations of that indictment, if you believe from this evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska contrary to this law, then the defendants are guilty as charged in that indictment. The fact that it was a glass, pint or quart cuts no figure, as the law authorizes the allegation to be made in that way.

Now, in order to authorize a conviction, you want to direct your attention to three propositions: First. Has there been a sale? Second. Was the sale an intoxicating liquor? And third. Was it sold by these defendants, or either of them in person or through any agent, servant or employee?

A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is the transfer of any kind of property from one person to another person for current money of the United States.

I charge you that if you find that a sale was made and that the sale was the liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors.

Now, as to the sale by these defendants. You may under this indictment and this evidence if you think the evidence warrants it, after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in this case.

Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his servant or employee: That principle applies to a proprietor who has charge of a manufacture and also any institution where intoxicating liquors are sold; he is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee. I charge you further that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes, he is the servant, agent, or employee of the proprietor of the establishment and if either the bartender or the waiter have carried or furnished drinks to any person or customers in that house, that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment.

Now, in view of the offer of Mr. Crews, in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled, and that you do not misapprehend the law in that regard. The license which is granted under the Internal Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They therefore give to liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer

without having put up his money and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without the license; so, therefore, the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the statute now under consideration.

You have a right in considering this evidence, and I instruct you, that you must consider it all; if there are any discrepancies, try and reconcile them; if not, come to such a conclusion as the truth points to, and satisfy your mind what are true. And in viewing the testimony you have a right to use your own observation and experience as reasonable and sensible men; you have a right to consider what you know from your own experience of bars and bar fixtures and a saloon outfit is used for. You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers. You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere, the use of the electric bell for the purpose of calling a waiter to order the drinks served. It is a matter of every-day occurrence now, just like the telephone and telegraph through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every-day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony.

It is also your duty to take into consideration the appearance of the witnesses; their apparent candor and fairness in testifying, whether they are unwilling and trying to keep back something in order to shield the defendant or not. You have a right to take into consideration all the opportunities which any witnesses might have had for knowing or seeing the matters he testified to. You have a right to consider the probable or improbable nature of the story which the witness tells, and from the whole of this testimony and your judgment, experience, and observation as reasonable men applied to this evidence arrive at the true facts.

Now, it is true that the defendants are entitled to the benefit of the doubt; this is a criminal prosecution, but you must not be misled as to the nature of that doubt or as to what your duties in connection with any such doubt in weighing this evidence may be. A reasonable doubt is not something you imagine the possibility that the defendant is not guilty or some speculative or chimerical doubt which may have arisen in your minds outside of the evidence, but the doubt must be based upon the testimony in the case, or based upon a want of testimony. It must arise out of this trial itself and the testimony that has been disclosed to you on that trial, or the want of such testimony; in other words, I charge you that in order to make a reasonable doubt you must have in your minds an honest and substantial misgiving founded on the testimony that the defendant is not guilty.

Now, one step further, and I am through. The federal courts allow the Judges sometimes to give an opinion on the evidence.

I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding I charge you that you are the judges of the evidence and from that evidence it is for you to say whether or not they, or either of them, are guilty. You must not forget in this trial, you have no right whatever when you get into the jury room to question any provision of law, or to question this prohibitory liquor law; it is the law of this country, passed by the highest legislative power in the United States, and it is our duty to obey it. The very highest duty of good citizenship is to support the constitution and uphold the laws of the United States, no matter what they may be.

And, gentlemen, if you believe from this evidence that these defendants, or either of them, are guilty, beyond a reasonable doubt, as I have charged you the law to be, you will find them guilty; if you do not so believe you will return a verdict of not guilty.

In addition to that, inasmuch as some reference has been made to the fact that these defendants did not take the witness stand and testify, you will not consider that. The law authorizes them to be sworn if they want to, but if they do not want to be sworn that raises no presumption one way or the other; so you will not consider that fact.

(Counsel for the defendants in open court and in the presence of the jury duly excepted to each and every part of the Court's instructions to the jury and also to the instructions as a whole.)

The Court further instructs the jury:

If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant Endelman, he being the proprietor of the Louvre building, if you so find, then the proprietor is responsible for the acts of the agent or employee, so far as such sales are concerned, and is equally guilty with the employee.

The principal can be convicted under this evidence if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him.

(Excepted to by counsel for defendants.)

And afterwards, to-wit, on December 18, 1896, a motion in arrest of judgment was filed in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Motion in Arrest of Judgment.

Comes now the above-named defendant, Max Endleman, and moves the Court in arrest of judgment upon the following grounds, to-wit:

1st. That the Grand Jury, by which the indictment against the defendants was found had no legal authority to inquire into the crime charged, because the Court has no jurisdiction of the subject matter of the action.

2d. That the facts stated in the indictment do not constitute a crime.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Motion in arrest of judgment. Filed December 18, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterward, to-wit, on said December 18, 1896, a motion for new trial was filed in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Motion for New Trial.

Comes now the above-named defendant, Max Endelman, and moves the Court to set aside the verdict rendered against him in the above-entitled action and to grant a new trial; that this motion is made and based upon the following grounds affecting the substantial rights of this defendant:

1st. Irregularity in the proceedings of the Court during the trial of the defendant, excepted to by the defendant.

2d. Abuse of discretion on the part of the Court in permitting the prosecution to prove, or attempt to prove,

a sale of whisky at any time and to any person within one year prior to the finding of the indictment against the defendant, by which this defendant was prevented from having a fair trial.

3d. Insufficiency of the evidence to justify the verdict.

4th. That the verdict is against law.

5th. Error in law occurring at the trial and excepted to by the defendant.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Motion for new trial. Filed December 18, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on said December 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,
vs. } No. 612.
MAX ENDLEMAN, Defendant.

Order Denying Motion in Arrest of Judgment, and for New Trial.

Now, at this time comes the plaintiff, by Burton E. Bennett, U. S. Attorney, and the defendant appearing by counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., present their motion in arrest of judgment and for a new trial, and the Court being fully advised in the premises, denies both said motions.

And afterwards, to-wit, on said December 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,
vs.
MAX ENDLEMAN, Defendant.
No. 612.

Judgment.

Now comes the plaintiff, by Burton E. Bennett, U. S. Attorney, as also the defendant in person, with Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., his counsel, and appearing for judgment—

It is ordered, adjudged, and decreed that defendant be and he is hereby convicted of the crime of unlawfully selling intoxicating liquors within the District of Alaska, and sentenced to pay a fine of one hundred dollars, and that he be imprisoned in the jail at Sitka until said fine is paid, for a term not exceeding 60 days.

And afterwards, to-wit, on January 7, 1897, a petition for writ of error was filed in said cause, which is in words and figures following, towit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Petition for Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

To the Honorable ARTHUR K. DELANEY, Judge of the United States District Court for the District of Alaska.

The petition of Max Endleman and Edward Lord shows to this Honorable Court as follows:

1. That your petitioners are the defendants above named; that in said cause there was entered at a term of court held at Juneau, in the District of Alaska, beginning on the 9th day of November 1896, the final judg-

ment entered upon the verdict of a jury on the 18th day of December, 1896, wherein the defendant, Max Endelman, was adjudged to be guilty of violating the prohibitory law prohibiting the manufacture, importation, and sale of intoxicating liquors in the District of Alaska, whereas the defendant, Max Endelman, was adjudged to pay a fine of one hundred dollars ($100.00), and in default of the payment of said fine that he be confined in the penitentiary of Sitka, Alaska, for a period of sixty days (60), which said judgment and proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of complainants, your petitioner; that manifest error has been made in this case in the rendering of said judgment, to the great damage and injury of your petitioner, as the same fully appears from the assignment of errors in bill of exceptions filed herewith.

Wherefore, that in order your petitioner have relief in the premises, and for an opportunity to show the errors complained of, your petitioners pray that they may be allowed a writ of error in said cause, and that upon the giving by your petitioners of a bond, as by law required, all proceedings in this court be suspended and stayed until the determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Judicial District, and that a transcript of the records, proceedings, and all papers in this case duly authenticated may be transmitted to the Honorable Circuit Court of Appeals for the Ninth Judicial District, holding terms in San Francisco, State of California, to determine said writ of error.

MAX ENDELMAN,
Petitioner.

United States of America
District of Alaska. } ss.

Due service of the within petition is hereby accepted in the District of Alaska, this —— day of December, 1896, by receiving a copy thereof, duly certified to as such by C. S. Hannum, one of the attorneys for defendants.

BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for District of Alaska. United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants. Petition for writ of error. Filed January 7, 1897. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews Hannum & Ivey, and C. S. Blackett, Attorneys for petitioners. Office, Juneau, Alaska.

And afterwards, on said date, defendant filed his assignment of errors, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD,
Defendants.

Assignment of Errors.

Comes now the above-named defendant, Max Endelman, in error in the above-entitled cause, by Messrs. Crews, Hannum & Ivey, and C. S. Blackett, his attorneys and solicitors, and says, that in the records, proceedings, and trial in the above-entitled cause there is manifest error affecting the substantial rights of the defendant to his injury, as follows:

I.

That the Court erred in denying the defendant's motion to quash the indictment returned against him and Edward Lord; to the ruling of the Court denying said mo-

tion this defendant then and there duly excepted, which exception was duly allowed by the Court.

II.

That the Court erred in overruling defendant's demurrer to the indictment; to the overruling of said demurrer the defendant then and there excepted, and his exceptions were duly allowed by the Court.

III.

That the Court erred in denying defendant's motion made at the beginning of the trial to require the district attorney to elect upon what particular sale set forth in the indictment he would rely upon for a conviction in this cause against the defendant; to the ruling of the Court denying said motion, the defendant then and there duly excepted, which exception was duly allowed by the Court.

IV.

That the Court erred in overruling the defendant's objection to the introduction of any testimony on behalf of the Government in this cause, which motion was based upon the ground that the indictment does not state facts sufficient to constitute a crime, and upon the further ground that the defendant had no notice from the indictment upon what charge he would be put upon trial; to this overruling of the objection by the Court defendant duly excepted, which exception was duly allowed.

V.

That the Court erred in allowing the district attorney to introduce testimony tending to prove a sale of intoxicating liquors by the defendant at any time within one year prior to the finding of the indictment; to the order and ruling of the Court the defendant duly excepted, which exception was allowed by the Court.

VI.

That the Court erred in permitting the prosecution to introduce in evidence over the objection of the defendant a printed advertisement, purporting to be an advertisement of the Louvre Theatre, which advertisement appears in the "Mining Record," a newspaper published at Juneau, Alaska; to the overruling of defendant's objection the defendant duly excepted, and the exception was allowed by the Court.

VII.

That the Court erred in denying defendant's motion to discharge the defendant at the time the prosecution rested its case; to the ruling of the Court denying said motion defendant duly excepted, which exception was duly allowed by the Court.

VIII.

That the Court erred in denying defendant's motion to require the district attorney to disclose and elect at the

time he rested the case upon what particular sale, and at what particular time, to what particular person he relied upon for a conviction in this case; to the ruling of the Court denying said motion the defendant duly excepted, and the exception was allowed by the Court.

IX.

The Court erred in refusing to allow the defendant to introduce in evidence a license granted to the defendant, Max Endelman, by the Collector of Internal Revenue for the District of Oregon, of which the District of Alaska forms a part, authorizing the defendant, Max Endelman, to sell and retail spirituous liquors in the town of Juneau, District of Alaska; to the ruling of this Court denying defendant's offer and excluding the testimony offered, the defendant duly excepted, which exception was allowed by the Court.

X.

That the Court erred in giving the following instructions to the jury:

First.—"If you believe from this evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska contrary to this law, then the defendants are guilty as charged in that indictment. That the fact that it was a glass, pint, or quart cuts no figure, as the law authorizes the allegation to be made in that way."

Second.—Now, in order to authorize a conviction, you want to direct your attention to three propositions: First. Has there been a sale? Second. Was the sale an intoxicating liquor? And Third. Was it sold by these defendants, or either of them, in person or through any agent, servant, or employee?"

Third.—A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is the transfer of any kind of property from one person to another person for current money of the United States."

Fourth.—"I charge you that if you find that a sale was made, and that the sale was the liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors."

Fifth.—"Now, as to the sale by these defendants: You may under this indictment and this evidence if you think the evidence warrants it, after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty, or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in this case."

Sixth.—"Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his servants or employee; that principle applies to a proprietor who has charge of a manufacture and also any institution

where intoxicating liquors are sold; he is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee."

Seventh.—"I charge you further, that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes is the servant, agent, or employee of the proprietor of the establishment, and if either the bartender or the waiter have carried or furnished drinks to any persons or customers in that house, that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment."

Eighth.—"Now, in view of the offer of Mr. Crews, in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled and that you do not misapprehend the law in that regard. The license which is granted under the Internal Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government, and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They, therefore, give to the liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer without having put up his money

and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without a license; so, therefore the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the statute now under consideration."

Ninth.—"And in viewing the testimony you have a right to use your own observation and experience as reasonable and sensible men; you have a right to consider what you know of your own experience of bars and bar fixtures and a saloon outfit is used for."

Tenth.—"You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers."

Eleventh.—"You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere, the use of the electric bell for the purpose of calling a waiter to order the drinks served. It is a matter of every-day occurrence now, just like the telephone and telegraph, through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every-day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony."

Twelfth.—"The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding I charge you that you are the judges of the evidence, and from that evidence it is for you to say whether or not they, or either of them, are guilty."

To all and each of said instructions the defendant duly excepted, which exceptions were duly allowed by the Court.

XI.

That the Court erred in giving the following additional instructions to the jury:

First.—"If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant Endelman, he being the proprietor of the Louvre building, if you find so, then the proprietor is responsible for the acts of the agent or employee so far as such sales are concerned, and is equally guilty with the employee."

Second.—"The principal can be convicted under this evidence if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him."

To all and each of said additional instructions the defendant duly excepted, which exceptions were duly allowed by the Court.

XII.

That the Court erred in denying defendant's motion in arrest of judgment; to the ruling of the Court denying said motion the defendant duly excepted, which exception was allowed by the Court.

XIII.

That the Court erred in denying defendant's motion for a new trial; to the ruling of the Court in denying said motion defendant duly excepted, which exception was duly allowed by the Court.

XIV.

That the Court erred in entering any judgment as pronouncing any sentence against the defendant; to which the defendant duly excepted, which exception was allowed by the Court.

Wherefore, defendant prays that the judgment rendered and entered against him in the above-entitled court and cause be reversed, set aside, and held for naught; that the indictment under which defendant was tried be dismissed, and that the defendant go hence without day, and for such other and further relief as he may in law be entitled to have.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

United States of America,
District of Alaska. } ss.

Due serviceof the within assignment of errors is hereby accepted in the District of Alaska, this 29th day of December, 1896, by receiving a copy thereof duly certified to as such by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,
U. S. District Attorney for Plff.,District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Assignment of errors. Filed January 7, 1897. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterwards, on said date, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

No. 612.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants.

Order Allowing Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

Now, on this 7th day of January, 1897, comes the defendants, Max Endelman and Edward Lord, by their attorneys, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, and file herein and present to the Court their petition praying for an allowance of a writ of error intended to be urged by them; praying also for the transcript of the records, proceedings, and papers upon which the judgment herein was rendered, together with all other papers, records, and files in said cause, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and fur-

ther proceedings may be had that may be proper in the premises.

In Consideration Whereof, the Court does not allow the writ of error, and all proceedings in this case shall be stayed and suspended during the pendency of said writ in said Court.

Done in open court at Juneau, Alaska, this 7th day of January, 1897.

ARTHUR K. DELANEY,
Judge of the United States District Court, for the District of Alaska.

And afterward, on said date, a writ of error was issued in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants.

Writ of Error.

United States of America, ss.

The President of the United States to the Honorable ARTHUR K. DELANEY, Judge of the United States District Court, for the District of Alaska, Greeting:

The cause in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the government of the United States of America, plaintiff, and Max Endelman and Edward Lord, defendants, a manifest error has happened to the great prejudice, injury, and damage of the said defendant, Max Endelman, as is said and appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, together with this writ, so as to have the same at said place in said Circuit on the 6th day of February, 1897, that the record and proceedings aforesaid being inspected, said Circuit Court of Appeals may

cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 7th day of January, 1897

Attest my hand and seal of the United States District Court for the District of Alaska, begun at the clerk's office at Juneau, Alaska, on the day and year last above written.

[Seal] CHARLES D. ROGERS,
Clerk of United States District Court for the District of Alaska.

Allowed.
Dated this 7th day of January, 1897.

ARTHUR K. DELANEY,
Judge of the U. S. District Court, for the District of Alaska.

United States of America, } ss.
District of Alaska. }

Due service of the within writ of error is hereby accepted in the District of Alaska, this 7th day of January, 1897, by receiving a copy thereof, duly certified to as such, by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendant. Writ of error. Filed January 8, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, on said date, there was issued out of said District Court of Alaska, a citation, which is in words and figures as follows:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Citation.

United States of America, ss.

To the Honorable Burton E. Bennett, United States District Attorney for the District of Alaska.

You are hereby cited and admonished to be and appear

at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, on the 6th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, pursuant to a writ of error filed in the clerk's office of the United States District Court for the District of Alaska, wherein Max Endelman and Edward Lord, plaintiffs in error, and the government of the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said defendants, as in said writ of error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable ARTHUR K. DELANEY, Judge of the United States District Court for the District of Alaska, this 7th day of January, 1897.

ARTHUR K. DELANEY,

Judge of the U. S. District Court, for the District of Alaska.

United States of America, }
District of Alaska. } ss.

Due service of the within citation is hereby accepted in the District of Alaska this 7th day of January, 1897, by receiving a copy thereof, duly certified to as such, by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,

United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Citation. Filed January 8, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett attorneys for defendants. Office, Juneau, Alaska.

And afterward, to-wit, on January 19, 1897, the following further proceedings were had and appear of record in said cause, to-wit:

No. 612.

UNITED STATES OF AMERICA,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants,

Order Allowing Extension of Time.

Now, on this day this cause came on to be heard upon the application of Max Endelman, plaintiff in error, for an order to enlarge the time, allowing the clerk of this Court thirty days' additional time to make his return to the writ of error heretofore issued and served in this cause.

It is ordered that the time be, and the same is, hereby

extended for a period of thirty days from the expiration of the time mentioned in said writ.

Dated at Sitka, Alaska, Jan. 19th, 1897.

ARTHUR K. DELANEY,
Judge.

And afterwards, to-wit on said date, the defendant filed his bill of exceptions, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Bill of Exceptions.

Be it remembered that at the adjourned November term of the United States District Court, for the District of Alaska, commencing on the 9th day of November, 1896, the Grand Jurors of the United States of America, for the said District of Alaska, on the 8th day of December 1896, returned and caused to be filed in said court a true bill of indictment against the above-named defendants, which indictment is in the following words and figures:

United States of America,
District of Alaska. } ss.

UNITED STATES OF AMERICA,

vs.

MAX ENDELMAN and EDWARD LORD.

23 U. S. Statutes at Large, Chapter 53, Section 14.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord, one thousand eight hundred and ninety-six, begun and held at Juneau, in said district, commencing on the 9th day of November, 1896.

The Grand Jurors of the United States of America, selected, impaneled, sworn, and charged within and for the District of Alaska, accuse Max Endelman and Edward Lord by this indictment of the crime of unlawfully selling intoxicating liquors within said district, committed as follows: The said Max Endelman and Edward Lord at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on or about the 7th day of December, in the year of our Lord, one thousand eight hundred and ninety-six, and at divers other times before, did unlawfully and willfully sell to John Doe and Richard Roe and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown,

an intoxicating liquor called whisky, to-wit, one glass, pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors aforesaid unknown; without having first complied with the law concerning the sale of intoxicating liquors, in the District of Alaska. And so the Grand Jurors duly selected, impaneled, sworn, and charged as aforesaid upon their oaths do say: That Max Endelman and Edward Lord did then and there unlawfully sell intoxicating liquors in the manner and form aforesaid to the said John Doe and Richard Roe, and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

(Signed) BURTON E. BENNETT.
United States District Attorney.

That there is indorsed on the back of said indictment the following words and figures:

"No. 612. United States of America vs. Max Endelman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. A true bill. Edward De Groff, Foreman of Grand Jury. Witnesses examined before Grand Jurors: C. W. Young, Karl Koehler, Fred Heyde, S. M. Graf." (Signed) "Burton E. Bennett, U. S. Attorney. Filed Dec. 8, 1896. Charles D. Rogers, Clerk."

That prior to the time the defendants were required to plead to said indictment they duly made and caused to be filed with the clerk of said court a motion to quash

said indictment which said motion was based upon the following grounds:

1st That two or more offenses are charged in the same count in the indictment.

2d. That the indictment is fatally defective for duplicity.

3d. That two or more offenses are charged in the same indictment in the same count against the defendants without segregating the offenses committed by each defendant.

4th. That the indictment is too vague, indefinite, and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defense.

That said motion and the questions of law raised thereby were duly argued and submitted to the Court; after duly considering the same the Court made an order denying defendants' said motion; to the ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

That immediately after the making of the order by the Court denying said motion to quash the defendants filed a demurrer to the said indictment upon the following grounds:

1st. That the Court has no jurisdiction over the subject matter of the action.

2d. That more than one crime is charged in the indictment against the defendants in the same count.

3d. That the facts stated in the indictment do not constitute a crime or any crime against the defendants or either of them.

That the Court declined to hear any argument from counsel upon said demurrer and made and caused to be entered an order overruling said demurrer; to the order and ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

That immediately after the entry of the order overruling said demurrer and allowing defendants' exceptions, the Court required said defendants to plead to said indictment; that each of the defendants then and there entered a plea of not guilty.

That thereafter and on the 17th day of December, 1896, this cause came on for trial, and after the jury had been impaneled and sworn to try said cause; whereupon William Hale was called and sworn as a witness on behalf of the prosecution.

That thereupon and before any evidence was introduced the defendants moved the Court as follows:

"That inasmuch as the indictment charges that on or about the 7th day of December, 1896, the defendants sold intoxicating liquors to John Doe, Richard Roe, and other parties, that the district attorney be required to elect

upon what particular sale he chooses to rely for a conviction in this cause." Which motion was denied by the Court; to the ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

Thereupon the defendants interposed the following objections:

"Counsel for the defendants objected to the introduction of any testimony in this cause, for the reason that the indictment does not state facts sufficient to constitute a crime; for the further reason that the defendants have no notice from the indictment upon what charge they are put upon their trial." The objection was overruled by the Court, and the defendants duly excepted, which exception was allowed by the Court.

The prosecution called W. H. Swinehart, who was sworn as a witness on behalf of the United States, and testified that he was the business manager for the Alaska "Mining Record," a weekly newspaper published in Juneau, and knew Max Endelman, one of the defendants, and knew his (Endelman's) place of business. The district attorney then asked the following questions: "From who did you obtain that ad?" (Called the witness' attention to an ad. in the Alaska "Mining Record.") The witness answered: "I didn't obtain the ad. My brother solicited the advertisement." Question. "Did you ever do any collecting on that ad.?" Answer. "Yes, sir." Question. "From whom did you collect?" Answer. "Max Endelman." After which testimony, it being all

the material testimony given by the said witness, the district attorney offered in evidence the advertisement above referred to, which read as follows:

"THE LOUVRE THEATRE.
Max Endleman, Proprietor.
Newest, Most Completely Equipped in Alaska.
Juneau, Alaska.

The latest and Best Vaudeville performances rendered Nightly by the Leading Histronic Artists. Special attractions weekly."

To the introduction of said advertisement in evidence the defendants interposed the following objection:

"Counsel for the prosecution offered in evidence the advertisement above referred to.

"Counsel for the defendants objected to said advertisement, for the reason that the same shows that Max Endelman is the proprietor of the Louvre Theatre, and for the further reason that it is incompetent and immaterial so far as the defendant Lord is concerned, and for the further reason that the proprietorship of the Louvre Theatre, and the proprietorship of the barroom has not been connected, and for the further reason that the foundation for the introduction of the same has not been laid, for it has not been shown that the advertisement was published at the request of the defendant."

Objection overruled by the Court, and defendants duly excepted, which exception was allowed by the Court.

At the close of the evidence on the part of the prosecution the defendants moved the Court as follows:

"Counsel for the defendants moved the Court that the defendants and each of them be discharged at this time, for the reason that the government has failed to make out a case against them, jointly or severally; that the indictment charges Max Endelman and Edward Lord with having violated the prohibitory law of Alaska on and prior to the 7th day of December; that the indictment charges that the defendants sold to John Doe and Richard Roe and other parties; that indictment charges two separate and distinct offenses committed by two separate and distinct individuals at different times, and the testimony in no way has connected them with each other, or has shown any privity or relation between them, but as it stands under the indictment the proof shows them to be two separate and distinct defendants, and shows two separate and distinct crimes committed at different times."

The Court declined to hear defendants' counsel, and made the following remarks in the presence and hearing of the jury:

"By the Court.—In declining to hear counsel for the defendants this morning upon the motions and objections interposed touching the indictment, the Court declined to hear him for the reason that the question as to the validity of the indictment was heard upon a motion to quash after which a demurrer was interposed and overruled; and then upon the former trial before the other jury arguments were presented on motions and objections touching the indictment, and the Court felt on the hearing today that the matter had been sufficiently heard,

and therefore declined to hear further argument. I shall now also deny the motion made by counsel to discharge the defendants."

To the remarks, ruling, and order of the Court the defendants duly excepted which exception was allowed by the Court.

The defendants then interposed the following motion:

"Counsel for the defendants moved the Court that the District Attorney be required as the testimony discloses, an attempt to prove several different sales of liquor at several different times and dates to elect upon what particular sale and what particular time he chooses to rely for a conviction in this case."

Motion denied by the Court, and the defendants duly excepted, which exception was allowed by the Court.

The defendants then made the following offer:

"The indictment charges that Max Endelman and Edward Lord on or prior to the 7th day of December sold intoxicating liquors in the District of Alaska, without first complying with the law; under the indictment as it reads the defendants are not advised as to what law they are charged with violating, whether it is the prohibitory law in the District of Alaska, or section 3242 of the Revised Statutes, and therefore defendants now tender in evidence a license granted by the Collector of Internal Revenue of the District of Oregon, of which Alaska is a portion, authorizing the defendants to sell and retail spirituous liquors in the District of Alaska."

"We desire to offer this to show to the jury that we are not guilty of violating the revenue law; that we have complied with the statute in that respect, having paid out money to the government, and they have received it and by their license have authorized us to engage in the sale of liquor so far as the revenue part of the government is concerned."

That the evidence offered is in the following words and figures:

"$25.00. No. F. 58182.
Series of 1896. Series of 1896.

United States.

[Stamp for Special Tax.]

Internal Revenue Act of October 1, 1890.

Received from Max Endelman the sum of twenty-five-100 dollars, for special tax on the business of retail liquor dealer at Juneau, Alaska, for the period represented by the coupon or coupons hereto attached.

Dated at Portland, July 7, 1896.

HENRY BLACKMAN,
Collector Dist., State of Oregon.

$25—per year. {United States Internal Revenue.}

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business.

That the coupons referred to as being attached to said evidence so offered are in the following words and figures:

"Coupon for Retail Liquor Dealer's Special Tax for June, 1897.

Coupon for Retail Liquor Dealer's Special Tax for May, 1897.

Coupon for Retail Liquor Dealer's Special Tax for April, 1897.

Coupon for Retail Liquor Dealer's Special Tax for March, 1897.

Coupon for Retail Liquor Dealer's Special Tax for February, 1897.

Coupon for Retail Liquor Dealer's Special Tax for January 1897.

Coupon for Retail Liquor Dealer's Special Tax for Dec., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Nov., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Oct., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Sep., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Aug., 1896.

Coupon for Retail Liquor Dealer's Special Tax for July, 1896."

That there is also printed in red ink upon the face of said written evidence the following words and figures:

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any state for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State, or in places prohibited by municipal law. See section 3242, Revised Statutes U. S."

The offer was denied, and the evidence excluded by the Court; to the ruling of the Court the defendants duly excepted, which exception was allowed by the Court.

That after the argument of counsel the Court proceeded to instruct the jury; that in the Court's instructions to the jury he erred in giving the following instructions:

First.—"If you believe from the evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska, contrary to this law, then the defendants are guilty as charged in that indictment.

The fact that it was a glass, pint, or quart cuts no figure, as the law authorizes the allegation to be made in that way."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Second.—"Now, in order to authorize a conviction you want to direct your attention to three propositions:

First.—Has there been a sale? Second. Was the sale an intoxicating liquor? And Third. Was it sold by these defendants or either of them, either in person or through any agent, servant, or employee?"

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Third.—"A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is

the transfer of any kind of property from one person to another person for current money of the United States."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Fourth.—"I charge you that if you find that a sale was made, and that the sale was liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Fifth.—"Now, as to the sale by these defendants: You may under this indictment and this evidence, if you think the evidence warrants it after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty, or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in the case."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Sixth.—Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his ser-

vant or employee. That principle applies to a proprietor who has charge of a manufacture and also any institution where intoxicating liquors are sold. He is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Seventh.—"I charge you further, that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes, he is the servant, agent, or employee of the proprietor of the establishment, and if either the bartender or the waiter have carried or furnished drinks to any persons or customers in that house; that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment."

To the giving of such instruction the defendants then and there duly excepted, which exceptions were allowed by the Court.

Eighth.—"Now, in view of the offer of Mr. Crews in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled and that you do not misapprehend the law in that regard. The license which is granted under the Internal

Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They therefore give to liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer without having put up his money and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without a license; so, therefore, the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the Statute now under consideration."

To the giving of such instruction the defendants then and there duly excepted which exception was allowed by the Court.

Ninth.—"And in viewing the testimony you have a right to use your own observations and experience as reasonable and sensible men; you have a right to consider what you know from your own experience of bars and bar fixtures and a saloon outfit is used for."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Tenth.—"You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Eleventh.—"You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere; the use of the electric bell for the purpose of calling a waiter to order the drinks served; it is a matter of every day occurrence now, just like the telephone and telegraph, through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Twelfth.—"The federal courts allow the Judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding, I charge you that you are the judges of the evidence and from that evidence it is for you to say whether or not they, or either of them, are guilty."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

That after being instructed by the Court the jury retired to deliberate on their verdict; that before agreeing upon the verdict the jury returned into court and requested the evidence of certain witnesses to be read. Whereupon, the testimony was read by the stenographer, after which the Court gave the jury the following additional instructions:

"If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant, Endelman, he being the proprietor of the Louvre building, if you so find, then the proprietor is responsible for the acts of the agent or employee, so far as such sales are concerned, and is equally guilty with the employee.

"The principal can be convicted under this evidence, if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him."

To the giving of each of said additional instructions the defendants duly excepted which exception was allowed by the Court.

After which the jury again retired, and subsequently returned into court with a verdict finding the defendant Max Endelman guilty, and the defendant Edward Lord not guilty.

That thereafter and prior to the entry of judgment by the Court against the defendant Max Endelman, defendant made and filed a motion in arrest of judgment upon the following grounds:

1st. That the Grand Jury, by which the indictment against the defendants was found, had no legal authority to inquire into the crime charged, because the Court has no jurisdiction of the subject matter of the action.

2d. That the facts stated in the indictment do not constitute a crime.

The motion was denied by the Court, and defendant duly excepted which exception was allowed by the Court.

That thereupon the defendant Max Endelman filed his motion for a new trial upon the following grounds:

1st. "Irregularity in the proceedings of the Court during the trial of the defendant; excepted to by the defendant."

2d. "Abuse of discretion on the part of the Court in permitting the prosecution to prove, or attempt to prove, sale of whisky at any time and to any person within one year prior to the finding of the indictment against the defendant, by which this defendant was prevented from having a fair trial."

3d. "Insufficiency of the evidence to justify the verdict."

4th. "That the verdict is against law."

5th. "Error in law occurring at the trial and excepted to by the defendant."

That the Court overruled said motion for a new trial, and defendant duly excepted to the ruling of the Court, which exception was allowed by the Court.

That there was no evidence offered on behalf of the prosecution proving or tending to prove that the defendant Max Endelman ever in person sold to any one any whisky, or any other intoxicating liquors, as charged in the indictment, or otherwise.

That the only evidence offered tending to prove a sale of whisky under said indictment shows that if any whisky was sold it was sold either by the defendant Edward Lord or one James Morrison.

That the following is all the testimony offered, except the testimony of the witness W. H. Swinehart, and the advertisement above referred to in this bill of exceptions, tending to prove that the defendant Max Endelman was the owner, or proprietor, or had any interest in the bar or bar-room situate in the Louvre Theater building, from and over which it is claimed that the whisky was sold:

The witness William Hale testified: "That he knew where the place of business called the Louvre was; that it was on the waterfront in Juneau, Alaska; that there was a theater in the back part of the building and a bar-room in the front part; that the bar-room has a bar and

bar fixtures, glasses, decanters, and mirrors; that there are wide double doors between the bar-room and the theater boxes in the theater, which are connected with the bar-room by electric bells; that there is an elevator running from the bar-room to the upper floor, and that the room above connects with the theatre, and that he had seen beer and whisky sent up in the elevator, and had seen beer and whisky sold over the bar by Edward Lord and James Morrison between July 1st and December 7th, 1896."

The district attorney asked the following questions of the Witness Hale:

"Do you know the proprietor of this place?" Answer. "I do." "Who is he?" Answer. "Mr. Endelman." "The defendant here?" Answer. "Yes, sir."

That the witness Hale upon cross-examination testified that he was United States marshal for Juneau, Alaska, and had held the position for three years, and was holding that position when he saw those sales of liquor made; that they were made in his presence; that he made no arrests nor any attempt to prevent the sale, nor did not command them not to sell liquor in there at that time, or at any time; that he made no attempt to prevent the crime of selling liquor."

The witness Squire Howe testified: "That he had purchased whisky a few times of Edward Lord and Mr. Morrison at the Louvre; that he only knew by reputation who the proprietor of the Louvre was; that he had heard Mr. Endelman was; that he had seen him in there and around

there; that he knew nothing about the relation defendant Lord sustains to the proprietorship of the house (meaning the Louvre), and that he did not know what relation Mr. Endelman sustained to the house."

That the witness William Rudolph testified: "That he had purchased whisky in the theater part of the Louvre of a waiter—he did not know his name; that he touched a button and a waiter came; that he ordered drinks; the waiter went away, came back with drinks, and he (witness) paid waiter for them, and that it occurred in the Louvre, but that he did not know where the drinks came from; that they might have come from George Rice's place, or the bar down stairs."

The witness James Morrison testified: "That he was employed at the Louvre Theatre; that he did not know who the proprietor was; that he was engaged by Max Endleman and had been paid by him; that he did not know of his own knowledge that Max Endelman was the proprietor of the Louvre; that Endelman was around there all the while."

The witness Frank Nugett testified: "That he was a waiter and employed in that capacity by the Louvre Theatre; that Max Endelman employed him and paid him his wages, and that he obeyed his orders; that he worked in the theatre part; and that the theater and the bar-room can be made one place, and that between the hours of eight and twelve o'clock they are one place; that there are boxes arranged in the upper part of the theatre and seats in them for patrons to sit down in; the boxes have

electric bells, did not know exactly where they led to, but thought nearly to the bar-room; that he was employed to wait upon the customers of the theatre. I do not know who constitutes the Louvre Theatre Company, and do not know that Max Endelman is the company or the cashier of the company; only know that he employed me to work for the Louvre Theatre Company."

The witness Edward Kelly testified: "That he had bought stuff of defendant Lord called "whisky" from behind the bar; that he knew nothing about the proprietorship of the Louvre, or any one's connection with it."

The witness Frank Young testified: "That he had purchased whisky of Lord and Morrison; had seen them both behind the bar; had seen Mr. Endelman around there the greater part of the time he (witness) had been there, but did not know who the Louvre Theatre Company was, and did not know that the Louvre Theatre Company had anything to do with the bar, and did not know that Max Endelman was the owner or proprietor of any part of the saloon; that Max Endelman had been in witness' place of business and purchased some hardware and chairs; that he (witness) had seen some of the chairs purchased in the Louvre Theatre; that he did not deliver them; that some one came after them, and that he guessed Max Endelman had paid for them; that he did not know in what capacity Mr. Endelman was acting in relation to the Louvre Theatre Company. He might be agent or cashier."

Richard Johnson testified: "That he purchased liquor of Lord, and had seen Mr. Endelman about the place, but

did not know what relation Lord or Endelman sustained to the company."

John McCormick testifies: "That he had seen liquor sold there, and bought it himself from Mr. Lord, but did not know who composed the Louvre Theatre Company, or any of its officers or agents."

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Attorneys for Plaintiff in Error.

Certificate to Bill of Exceptions.

The foregoing bill of exceptions is correct, and it is hereby agreed that the same may constitute a part of the record in this cause and be certified to the United States Circuit Court of Appeals for the Ninth Circuit.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Attorneys for Plaintiff in Error.
BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

The foregoing bill of exceptions is hereby settled and allowed, and ordered to be made a part of the record in this cause.

Dated at Sitka, Alaska, this 19th day of January, 1897.

ARTHUR K. DELANEY,
Judge.

United States of America,
District of Alaska. } ss.

I, Max Endelman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action, and that the foregoing bill of exceptions is true as I verily believe.

Subscribed and sworn to before me this day of January, 1889.

Notary Public for the District of Alaska.

United States of America,
District of Alaska. } ss.

Due service of the within bill of exceptions is hereby accepted in the District of Alaska, this 18th day of January, 1897, by receiving a copy thereof, duly certified to as such by C. S. Hannum, one of the Attorneys for plaintiff in error.

BURTON E. BENNETT,
U. S. Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants. Bill of exceptions. Filed January 19, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

Clerk's Certificate to Transcript.

United States of America,
District of Alaska. } ss.

I, Charles D. Rogers, clerk of the District Court of the United States of America, for the District of Alaska, do hereby certify, that the foregoing pages, numbered from one to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants, as the same remains of record and on file in said office, except the testimony adduced on the trial of said cause.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed, at the town of Sitka in said District, the 17th day of February, A. D. 1897.

[Seal] CHARLES D. ROGERS,
Clerk.

THE UNITED STATES OF AMERICA,
vs.
MAX ENDELMAN and EDWARD LORD.
No. 612.

Clerk's Certificate as to Cost of Transcript.

I, Charles D. Rogers, Clerk U. S. District Court, District of Alaska, do hereby certify, that the cost for preparing the transcript in the above-entitled cause is seventeen dollars, which amount I have received from Max Endelman, one of the above-named defendants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court.

[Seal] CHARLES D. ROGERS,
Clerk U. S. District Court.

[Endorsed]: No. 357. United States Circuit Court of Appeals for the Ninth Circuit. Max Endelman and Edward Lord, Plaintiffs in Error, v. The United States of America, Defendants in Error. Transcript of Record. In Error to the District Court of the United States for the District of Alaska.

Filed March 1st, 1897.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

No. 357.

IN THE
United States Circuit Court
OF APPEALS
FOR THE
NINTH CIRCUIT.

MAX ENDELMAN and EDWARD LORD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error from the District Court of Alaska.

BRIEF OF PLAINTIFF IN ERROR.

CREWS & HANNUM and C. S. BLACKETT,
Attorneys for Plaintiff in Error.

W. E. CREWS,
Advocate.

No. 357.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MAX ENDELMAN and EDWARD LORD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Max Endelman, Plaintiff in Error.

At the adjourned November term of the District Court of the United States for the District of Alaska Max Endelman and Edward Lord were jointly indicted for an alleged unlawful selling of an intoxicating liquor called whiskey; (transcript of record, pages 1, 2, and 3, for copy of indictment.)

After two trials the plaintiff in error, Max Endelman, was found guilty as charged in the indictment; (transcript, p. 16, for verdict.)

Thereafter and upon the verdict so rendered the Court pronounced judgment; transcript, p. 28.)

Before pleading the defendants duly and regularly served and filed a motion

to quash the indictment; (transcript, pages 6 and 7,) which said motion was duly argued and submitted to the Court and denied; (transcript, p. 8,) to which ruling the defendants duly excepted, and now contend that the order so made was an error effecting the substantial rights of Max Endelman, one of the plaintiffs in error, and is set forth as the first assignment of error, (transcript, p. 32.)

The indictment attempts to charge defendents with violating section 14, of chapter 53, p. 28, of volume 23, United States Statutes at Large, which reads as follows:—

"SEC. 14. THAT THE PROVISIONS OF CHAPTER THREE, TITLE TWENTY-THREE, OF THE REVISED STATUTES OF THE UNITED STATES, RELATING TO THE UNORGANIZED TERRITORY OF ALASKA, SHALL REMAIN IN FULL FORCE, EXCEPT AS HEREIN SPECIALLY OTHERWISE PROVIDED; AND THE IMPORTATION, MANUFACTURE AND SALE OF INTOXICATING LIQUORS IN SAID DISTRICT, EXCEPT FOR MEDICINAL, MECHANICAL AND SCIENTIFIC PURPOSES, IS HEREBY PROHIBITED UNDER THE PENALTIES WHICH ARE PROVIDED IN SECTION NINETEEN HUNDRED AND FIFTY-FIVE OF THE REVISED STATUTES FOR THE WRONGFUL IMPORTATION OF DISTILLED SPIRITS. AND THE PRESIDENT OF THE UNITED STATES SHALL MAKE SUCH REGULATIONS AS ARE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS SECTION.

"APPROVED MAY 17, 1884."

This indictment being founded upon an alleged violation of a federal statute, therefore, we must look to these statutes, or, in the absence of any, to the common law, to determine the sufficiency of the indictment.

Section 1024, United States Revised Statutes, provides how indictments shall be drawn, and reads as follows:—

"SEC. 1024. WHEN THERE ARE SEVERAL CHARGES AGAINST ANY PERSON FOR THE SAME ACT OR TRANSACTION, OR FOR TWO OR MORE ACTS OR TRANSACTIONS CONNECTED TOGETHER,OR FOR TWO OR MORE ACTS OR TRANSACTIONS OF THE SAME CLASS OF CRIMES OR OFFENCES, WHICH MAY BE PROPERLY JOINED, INSTEAD OF HAVING SEVERAL INDICTMENTS THE WHOLE MAY BE JOINED IN ONE INDICTMENT IN SEPARATE COUNTS; AND IF TWO OR MORE INDICTMENTS ARE FOUND IN SUCH CASES, THE COURT MAY ORDER THEM TO BE CONSOLIDATED."

The first contention in the defendant's motion to quash is:

"*That two or more offences are charged in the same count and in the same indictment.*" If this be true it is in direct violation of Sec. 1024, above quoted, and the Court erred in denying the motion.

Under the Statute alleged to have been violated (if any sale of intoxicating

liquor is a crime, and this subject will be treated hereafter) *every sale is a separate and distinct crime.* The exact number of offences the Grand Jury intended to charge the defendants with in this indictment cannot be determined from the indictment; however, several distinct offences are charged. The first offence attempted to be charged is the alleged selling to "*John Doe an intoxicating liquor called whiskey, to-wit: one glass, pint, quart, gallon of said liquor,* * * * " If the sale of a glass of whiskey to John Doe is a crime under the statute, the sale of a pint, a quart or a gallon, constitutes another, separate and distinct crime. In other words, every sale to John Doe constitutes a crime, and being of the same class of crimes, or offences, the statutes permits them to be joined in one indictment, but each offence must be charged in a *separate count.* If the defendants sold to John Doe a glass of whiskey this offence should be charged in one count. If on the same day, or at some other time, he sold to John Doe a pint of whiskey this offence should be charged in a separate count, and so on, in like manner, making a separate count for each offence.

The purpose and intent of the Statute is plain:

1. That the several offences of the same class may be tried at the same time.

2. That a trial jury may be able to render a verdict intelligently by returning a verdict of guilty upon some one or more counts, and not guilty on other counts, as the evidence may warrant.

3. The verdict thus rendered better enables the Court to pass judgment and fix the penalty, the extent of the defendant's punishment being determined in a measure by the number of offences he may be found guilty of committing.

4. That the defendant's conviction or acquittal may inure to his subsequent protection should he be again questioned on the same grounds.

The defendant Max Endelman was found guilty, "as charged in the indictment." *This means that he was found guilty of selling to John Doe and Richard Roe, and to divers other persons, whose real names are unknown, an intoxicating liquor called whiskey, to-wit: One glass, one pint, one quart, one gallon of said liquor on or about the 7th day of December, 1896, and at divers other times.* To how many other persons did he sell liquor to besides John Doe and Richard Roe? At how many other times did he sell liquor than the 7th day of December, 1896, and when and to whom? The indictment fails to disclose, and the verdict of the jury and the judgment of the Court are as equally uncertain. How then could the defendants plead or prepare for trial? Suppose Mr. Endelman was subsequently indicted for selling liquor to *Henry Jones* or some other person, whose true or real name is to the Grand Jury unknown, on the 25th day of November, 1896. How would the defendant or the Court be able to know that Henry Jones was not one of

the persons described in the former indictment as one of the "divers other persons?" Likewise, how would the defendant or the Court be able to determine whether or not the day of the alleged selling, November 25th, 1896, was not one of the "divers other times," mentioned in the former indictment? It might be the same date and person considered by the trial jury and upon which they agreed and based their verdict, and still the defendant would be deprived of the information that would enable him to plead a former conviction. He would be powerless to protect himself from being twice put in jeopardy for the same offence. Again, if evidence was introduced to prove twelve or more different offences (and in this case testimony was introduced tending to prove several separate and distinct sales) the jury might find a verdict of guilty without any two of them agreeing that the defendant was guilty of any particular one of such offences; one juror might believe that he was guilty of one offence; another juror of another, and so on with respect to all of the jurors and all of the offences which the evidence possibly tended to prove, and yet no two of the jurors agreeing that the defendant was guilty of the same offence.

The Statute under which the defendants were indicted makes every separate sale a crime and in this respect it differs materially from an indictment charging the defendant with keeping a place or maintaining a nuisance where intoxicating liquors are sold. Under an indictment of this character any number of sales may be shown, and the State is not required to elect upon which sale it will rely for a conviction. The gravamen of the offence, in the first instance, is the *sale of intoxicating liquors*. In the second instance it is the *maintaining of a place as a nuisance where intoxicating liquors are sold*. It may be claimed from the language of the indictment that the defendant only sold liquor to John Doe at one time and that the Grand Jury were unable to determine whether it was one glass, one pint, one quart, or one gallon. Under such a construction there would be but one offence charged and only one count required in the indictment. But we contend that such a construction is not the logical one, for the reason that if it was intended by the Grand Jury to mean only one sale to John Doe instead of enumerating several quantities, it would have been stated: "*a quantity of liquor, the amount of which is to the Grand Jury unknown.*"

If the indictment charges a sale to *John Doe*, it also charges a sale to *Richard Roe*; the language of the indictment as to *John Doe* and *Richard Roe* is identical. The sale to *John Doe* and *Richard Roe* are *two separate and distinct offences of the same class of crime*, and while they may be joined in the same indictment they must be set forth in *separate counts*, as provided for in the Statute above mentioned. If it is a crime to sell to John

Doe, it is equally as great a crime to sell to Richard Roe, both acts of selling constituting a separate and distinct crime neither allegation can be rejected as surplussage, and the crimes being charged in the same count in the same indictment renders the indictment fatally defective for duplicity, the second ground assigned in defendant's motion to quash the indictment.

U. S. vs. Patty, et al, 2nd Fed. Rep. 664.
" " Nye, " " " 888.
" " Wanthworth, 11th Fed. Rep. 52.
State of Kansas vs. Chandler, 1st Pac. Rep. 887.
" " Michael Crimmins, 2d Pac. Rep. 574.
" " Hahn, 2d Pac. Rep. 574.
" " Lund, 30th Pac. Rep. 518.
Leidtke vs. City of Saginaw, 4th Northwestern Rep. 627.
Burrell vs. the State of Nebraska, 41 Northwestern Rep. 399.
Com. vs. Ismahl, 134 Mass. 302.
Com. vs. Darling, 129 Mass. 112.
Pelts vs. Com., 126 Mass. 242.
Com. vs. Kimball, 73 Mass. 328.
Com. vs. Hill, 64 Mass. 530.
Carlton vs. Com., 46 Mass. 532.
State vs. Glidden, 55 Conn. 46.
Mergertheim vs. State, 107 Ind. 567.
Tahnestock vs. State, 102 Ind. 156.
Davis vs. State, 100 Ind. 154.
State vs. Weil, 89 Ind. 286.
Knoff vs. State, 84 Ind 316.
65 A. M. Dec. 383-386.
58 " " 338-334.
54 " " 499.
47 " " 588-599.
Gould and Tucker's notes on Revised Statutes, 343-4-5.

It may be contended that John Doe and Richard Roe are mythical persons. This contention cannot prevail for the reason that the indictment sets forth a sale to these persons without any reference to their being unknown. The allegation of a sale to "divers other persons whose real names are unknown" has no reference to John Doe and Richard Roe, and only relates to those unknown persons referred to in the indictment. Had the indictment read to John Smith and Richard Brown, and to divers others persons whose real names are unknown, no one would contend that the words "whose real names are unknown" had any reference to John Smith and Richard Brown. Why then

should any other construction be placed upon it when the names of John Doe and Richard Roe appear instead of John Smith and Richard Brown? Nothing can be assumed in favor of the indictment. The indictment must be explicit and leave nothing to inference, for nothing can be done by intendment.

State vs. Verrill, 54 Me. 408.
State vs. Philbrick, 31 Me. 401.
Com. vs. Rowell, 146 Mass. 128.
U. S. vs. Hess, 124 U. S. 483.

Because the names John Doe and Richard Roe are sometimes employed to describe persons whose real names are unknown it cannot be assumed that it was the intention to so use the names in this indictment. On the other hand, if they were used to represent persons whose real names are unknown it would make no difference in the application of the Statute, Sec. 1024, above set forth, because the same number of offences would still be charged in the same indictment and in the same count, rendering the indictment fatally defective for duplicity.

The authorities above cited, nearly all of which refer to the Statute quoted, bear directly upon this question, and the Court in each of those cases held that indictments drawn as this one is are fatally defective for duplicity.

The third ground set forth in the motion to quash is disposed of by the decision of the Court in the case of

State of Kansas vs. Crimmins.
" " Hahn, 2nd Pac. Rep. 574.
" " Lund, 30 " " 518.

We contend that the motion to quash should be granted upon the forth ground set forth in said motion, for the reason that the indictment is too indefinite and uncertain as to what law the defendant violated in the alleged sale of intoxicating liquors. It does not state whether the defendants violated the act providing a Civil Government for Alaska, or the Revenue laws, or the Regulations issued by the President of the United States, and, further, that the indictment is too vague, indefinite and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defence.

State of Kansas vs. Burket, 32 Pac. Rep. 926.
U. S. vs. Cruikshank, et al, 92 U. S. 542.
Gould and Tucker's notes, p. 345.
U. S. vs. Goggon, 1st Fed. Rep. p. 49.
The motion to quash should have been granted.

Immediately after the order of the Court was entered denying the motion to quash and exception taken, the defendants interposed a demurrer to the indictment (transcript, p. 9,) which demurrer was overruled by the Court, (order overruling demurrer, transcript, p. 10,) to which ruling the defendants duly excepted and now contend that the order so made was an error effecting the rights of Max Endelman, plaintiff in error, and is set forth as the second assignment of error, (transcript, p. 33.)

The first ground of the demurrer "that the Court has no jurisdiction over the subject matter of the action" presents the question as to the constitutionality of the law upon which the prosecution is based.

Sec. 14, Chap. 53, p. 28, Vol. 23, U. S. Statutes at Large.

We concede that the District Court of Alaska has jurisdiction of all crimes and offences cognizable under the authority of the United States committed within the district of Alaska.

U. S. Revised Statutes, Sec. 563 and 629, subdivision 20.

Sec. 7, p. 23, Vol. 23, U. S. Statutes at Large.

It is the duty of the Court to declare all legislative enactments that are in conflict with the Constitution void.

Vol. 3, A. M. and Eng. Ency. of Law, p. 673-4 and notes.

Cooley's Con. Lim. p. 194-186-209.

The government of the United States is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation, because it can exercise only those specific powers conferred upon it by and enumerated in the Constitution.

The powers of the government and the rights of the citizens under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise any other. It has no power over the person or property of a citizen except what the citizens of the United States have granted it. The legislative, executive nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. The power of Congress over the person or property of a citizen can never be a discretionary power under our constitution and form of government, for the reason that the powers of government and the rights and privileges of the citizen are plainly and specifically defined by the constitution itself. These questions have been settled by the Supreme Court of the United States in the case of

Scott vs. Sandford, 19th How. U. S. pages 401 to 450.

and the principles of law laid down in that decision upon these questions have been followed by the Courts of the United States in all subsequent adjudications.

The provisions of Sec. 3 of Article 4, of the Constitution, provides, among other things, that "*Congress shall make all needful rules and regulations respecting the territories, etc.,*" has no application whatever to the Territory of Alaska or the powers of the general government over Alaska, or the rights of its citizens for the reason that that provision of the Constitution related solely to the Territory ceded to the United States by the several States for the purpose of enabling Congress to dispose of the Territory and appropriate the proceeds as a common fund for the common benefit, protection and preservation of the several States, and was intended to be confined to the Territory which at that time belonged to, or was claimed by the United States and within their boundaries, as settled by the treaty with Great Britain, and has no application to, or confers any power upon Congress to control, or regulate, or legislate for any territory afterwards acquired from a foreign government, by treaty or conquest.

Scott vs. Sandford, 19th How. U. S. pages 432 to 446.

We concede that the National Government has the power through Congress to acquire territory by treaty with foreign nations. This being the rule, the next question to consider is the power of Congress over the territory acquired and its right to legislate for the Territory and from what source it derives its power. It has been held by the Supreme Court of the United States *that the right to acquire territory by the United States carries with it the inevitable right to govern the acquired territory*, and that in so doing exercises the combined powers of the National and State Government; hence, the right to govern Alaska is derived from the right to acquire it.

Am. Ins. Co. vs. Carter, 1 Pet. U. S. 542.

Bunner vs. Porter, 9th How. U. S. 235.

Cross vs Harrison, 16th How. U. S. 194.

Scott vs. Sandford, 19lh How. U. S. 439-454.

However, on the acquisition of territory by treaty the United States does not succeed to the *prerogative rights* of the former sovereign, but holds it subject to the institutions and laws of its own government, limited to the restricted powers specifically conferred upon Congress by the Constitution. In other words, whatever it acquires it acquires for the benefit of the whole people of the several States who created it. The National Government is their trustee acting for them, and charged with the duty of promoting the interest of the whole people of the Union, limited, however, in the exercise of the powers specially granted to it by the sovereign people who created it.

Taking this as a rule to guide us, and we contend that this is the correct rule, we claim that citizens of the United States who emigrate to a Territory belonging to the people of the United States cannot be ruled as mere colonists,

dependent upon the will of the general government and to be governed by any laws it may think proper to impose, except such laws as are clearly within the enumerated and restricted powers delegated to Congress by the Constitution, and we contend that Congress cannot by law restrict or abridge the rights and privileges of citizens residing within the States in respect to their commercial relations and dealings with the citizens of the United States who may emigrate to the acquired Territory any more or to any greater extent than it can or does between citizens of different States. There is certainly no power given by the Constitution to the National Government to acquire territory to be ruled and governed at its own pleasure permanently. The only manner it can enlarge its territorial limits in any way is by the admission of new States.

Scott vs. Sanford, 19 How. 445-454.

The power of Congress over the territory originally ceded to it by the several States and that which the government may have acquired subsequently by treaty or conquest is a very much different power than Congress exercises over the district of Columbia, the territory ceded to the government and accepted by Congress to become the seat of government of the United States.

In the first instance the power is restricted.

In the second instance the power is unrestricted.

Constitution, Article 1, Sec. 8.

" " 4, " 3.

Scott vs. Sanford, 19 How. 440-454.

The Constitution guarantees to the citizens the right to own, hold and acquire property, and makes no distinction as to the character of the property. Intoxicating liquors are property and are subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists and are so recognized by the usages of the commercial world and the decisions of Courts and laws of Congress.

Leisy vs. Hardin, 135 U. S. p. 100.

No word can be found in the Constitution which gives Congress a greater power over this species of property, or which entitles property of this kind to less protection than property of any other description, and the power conferred upon Congress is coupled with the duty of protecting the owner in all of his property rights. The power to regulate commerce "*among the the several States*" carries with it the right to regulate commerce among the several states, territories and districts.

Commerce has been judicially defined by Justice McLean in Smith vs. Turner, How. U. S. p. 401, to be "An exchange of commodities," and includes "Navigation and intercourse." When the power to regulate commerce "* * * * among the several states * * * *" was committed to Congress

there can be no doubt that the paramount idea in the minds of the framers of the Constitution, was to secure a uniform and permanent system of commercial relations between the whole people of the United States and prevent any embarrassing restrictions that might be imposed by any State against the free importation of commodities from another State. It does not tax the imagination to see how easily commerce could be obstructed, in fact, virtually destroyed, if the power to control it within the exterior boundaries of each State rested in the State Government. This power alone would create sectionalism, and long since would have divided the Nation into geographical subdivisions equal in number to the vacillating opinions of State legislators, and the caprice of successful political party leaders and agitators; hence, the power to regulate commerce was committed to Congress in order to secure its absolute freedom from all restrictions. Therefore, we contend that inasmuch as the power to regulate commerce was committed to Congress to relieve it from all restrictions that Congress itself cannot violate the spirit or intent which prompted the placing this power under its control by doing the very thing sought to be avoided, namely: restricting commerce. Therefore, we contend that an Act of Congress passed in pursuance of this delegative authority, which restricts the free importation of any commodity recognized by the usages of the commercial world, the laws of Congress and the decision of the Courts as a proper subject of commerce into any portion of the United States and permits the same commodity to be freely exported into other portions, is in direct violation of the rule governing interstate commerce, as recognized by Congress and the decision of the Courts, to-wit: "That such commerce shall be *free* and *untrammeled.*"

The power delegated to Congress to regulate commerce has been jealously guarded by the Courts, and every enactment of the several State Legislatures that has tended to interfere with a *free* and *untrammeled* commerce has been adjudged unconstitutional, and these decisions have been based upon the broad principle that this nation is a great union of states in which the whole people have a common interest coupled with the free and unrestricted right of commercial relations with each other and to secure a more perfect union of interest. Will the Courts, on the other hand, permit Congress to enact and enforce laws that in any manner restricts and abridges the very end sought to be attained by conferring the power to regulate commerce? We think not. The people of Alaska are as much a part of the sovereignty of this nation as those of any of the States and are equally entitled to the same rights, privileges and immunities, and entitled to enjoy free and untrammeled commercial relations with every other section of the United States, and every citizen of the United States residing outside of Alaska is entitled to enjoy by every principle upon

which the nation is founded free and unrestricted intercourse with the people of Alaska, unhampered by any Act of Congress that is not made applicable to every section of the United States.

The Supreme court in Leisy vs. Harding, 135 U. S. p. 100, In construing an Iowa Statute prohibiting the importation of intoxicating liquors into the State decided that the law was unconstitutional upon the ground that intoxicating liquors are property and a recognized subject of commerce, barter and exchange, and that it restricted the rights of its own citizens and those of the State of Illinois in their commercial relations. No one would contend that Congress under the delegated power to regulate commerce would have the right to enforce a law prohibiting the importation of wheat grown in Minnesota into the State of Illinois, nor into the Territory of Oklahoma and permit the wheat to be imported into New Mexico, or to prohibit the importation of the products of the soil of Wisconsin or of the factories of New Jersey into the Territory of Alaska. As subjects of commerce, barter and exchange, intoxicating liquors are entitled under the interstate commerce law to be as freely imported from one section of the country to the other as any other recognized subject of commerce.

Leisy vs. Harding, 135 U. S. p. 100,

and many other authorities cited by Chief Justice Fuller in support of his opinion concurred in by a majority of the Supreme Court.

The sale of intoxicating liquors as a beverage is regulated by the several States under police regulations, and it may be said that the sale of intoxicating liquors within the Territory of Alaska may be controlled by Congress exercising police regulations. We reply to such a contention; first, that the police powers belong to the State and have never been delegated to Congress, except so far as Congress may exercise it over the territories and District of Columbia.

Am. and Eng. Ency. of Law, Vol. 18, p. 745.

State vs. DeWitt, 9, Wal. U. S. 41.

and cases cited, where it is said that this principle is so well fixed as to be beyond all controversy. Second, that if Congress has the right to regulate the sale of intoxicating liquors within the territories, it can only enact laws applicable to all the territories; in other words, it has no power to enact a law prohibiting the sale of intoxicating liquors in the Territory of Alaska that would not be applicable to the Territory of New Mexico. In exercising its legislative functions it cannot abridge the privileges of some of its citizens and grant them to others any more than a State Legislature could enact a law prohibiting the sale of intoxicating liquors in one country and permitting the sale in another. Any state law regulating the sale of intoxicating liquors must be

a general one applicable to the same class. It was said by Justice Taney in his opinion in the Fred Scott case "That when the Constitution of the United States was framed it created a new government separate and distinct from the several State Governments, with limited and restricted powers." If the eminent jurist was correct, and we think it has not been questioned, this new government exercising its legislative functions must frame its laws so as to make them applicable to all of its citizens equally.

Police powers can only be exercised by legislative enactment, and while it rests within legislative discretion to determine when public welfare or safety requires its exercisce, courts are authorized to interfere and declare a statute unconstitutional when it conflicts with the Constitution, and there must always be a reason for the exercise of the police power and rights guaranteed by federal or state constitutions cannot be violated by the mere declaration that an occupation or any particular act is injurious to the public welfare.

Am. and Eng. Encv. of law, Vol. 18, p. 746.

and numerous cases cited.

The Government of the United States was not formed to enlarge the rights of citizens. It has no power to do so. Its functions are to secure and protect the rights and privileges that are inherent in the people and it does not possess any power to restrict or abridge these rights.

In passing upon the constitutionality of this law the Courts will inquire, first, is there a reason for the law? Second, does it take away from the citizens of Alaska any of the rights or privileges that other citizens of the United States living under the direct control of the federal government enjoy? Construed under the rule governing police regulations, as above set forth, if the Court can find no reason for the law, it should be adjudged unconstitutional. And, again, if the Court finds that by enforcing this federal police regulation that it is not universal in its application and abridges rights to some of the citizens that others enjoy, it should be declared of no force or effect.

What reason can be found for the law? It cannot be justified upon the hypothesis that the people of Alaska are so depraved in comparison with the rest of mankind that they require special legislation in this respect. Nor upon the ground that this is an Indian country.

In U. S. vs. Kie, 27 Fed. Rep. 355,

it was held that Alaska was not an Indian country.

The majority of the people of Alaska should be permitted to express their will as to the prohibition of intoxicating liquors in Alaska; its importation, sale and use should be regulated, if at all, by the expressed will of the majority, and not by the arbitrary will of a legislative body composed of members in the choice of which the Alaska citizen has no voice. The civil government

act, in so far as it prohibits the importation and regulates the sale of intoxicating liquors in Alaska, violates the fundamental and time-honored principles of republican institutions and should be declared void. Since the creation of our National Government Congress, for the first time, has seen fit to depart from those principles and enact arbitrary law, disregarding the will of the people, and it should be stopped at its first attempt. Why should Alaska be singled out? There can be no reason for it. Its condition does not differ from those that existed in other territories acquired by treaty. Its natives are much less fierce and warlike than those found in the territory ceded by the northwest treaty. At the time the civil government act was passed the object in view was to provide a *civil government* for Alaska. (The police regulation, if that clause in the act prohibiting the importation, manufacture and sale of intoxicating liquors in Alaska, can be called a police regulation), was not a proper subject of legislation in connection with the act, and from the wording of the paragraph and the position it occupies in the act, it is evident it was not under consideration by Congress, but was tacked on to meet the approval of some member whose idea of the liquor traffic was more nice than wise. It is the first time in the history of the Nation that a police regulation has been forced upon the people without an expression of the people governed by it. If Alaska is to continue to be governed by the Federal Government, Congress should not be permitted to enact and enforce police regulations without first giving the people of Alaska the right to be heard, either by submitting the proposed legislation to a vote of the citizens or permit them to be heard through a representative in Congress.

Article 1, Section 9, of the Federal Constitution, in defining the restrictions upon the powers of Congress, says:

"NO PREFERENCE SHALL BE GIVEN BY ANY REGULATION OF COMMERCE OR REVENUE TO PORTS OF ONE STATE OVER THOSE OF ANOTHER, * * *"

Forbidding the importation of intoxicating liquors into the Territory of Alaska by Congress is a regulation of commerce, and a preference in favor of every other port of the United States as against all Alaska ports. We contend that this section of the Constitution bears directly upon the question under consideration, and furnishes sufficient ground, standing alone, to warrant the Court in adjudging that portion of the civil government act prohibiting the importation of intoxicating liquors unconstitutional. We maintain in view of the well established principle above set forth that the civil government act of Alaska, in so far as it relates to the importation and sale of intoxicating

liquors, in original packages, is unconstitutional, and that the demurrer should be sustained.

If the Court should be of the opinion that, that portion of the civil government act, which prohibits the importation of intoxicating liquors into Alaska, and their sale in orlginal packages is unconstitutional then the indictment is fatally defective for uncertainty, for the reason that it does not contain a negative allegation to the effect that the alleged sale was not made in the original packages. The right to import intoxicating liquor carries with it the right to sell the same in original packages.

Leisy vs. Harding, 135 U. S. p. 100, and authorities cited.

The provisions of Chapter 3, Title 23, of the Revised Statutes, relating to the unorganized Territory of Alaska, are kept in full force by the Act providing a civil government for Alaska. (Section 14 of Chapter 53, Vol. 23, U. S. Revised Statutes at Large.)

SEC. 1955, REVISED STATUTES, PROVIDES, "THAT THE PRESIDENT SHALL HAVE POWER TO RESTRICT, REGULATE OR TO PROHIBIT THE IMPORTATION AND USE OF FIREARMS, AMMUNITION AND DISTILLED SPIRITS INTO AND WITHIN THE TERRITORY OF ALASKA * * * AND ANY PERSON WILLFULLY VIOLATING SUCH REGULATIONS SHALL BE FINED NOT MORE THAN $500.00, OR IMPRISONED MORE THAN SIX MONTHS * * *"

The power of the President under this law is limited to making rules and regulations restricting, regulating and prohibiting the *importation* and *use* of distilled spirits into and within the Territory of Alaska. The President has no power under this Statute to restrict, regulate, or prohibit the *sale of intoxicating liquors in Alaska*, and in the executive order issued by the President he only regulated the sale for medicinal, mechanical, and scientific purposes; sales for other purposes were not restricted, or attempted to be restricted by the order.

Executive order dated March 12, 1892.

Section 14, of Chapter 53, above quoted, provides, "and the President of the United States shall make such rules as are necessary to carry out the provisions of this section."

Until such a time as the President promulgates regulations in regard to the sale of intoxicating liquors this section remains inoperative. Subsequent to the inactment of this Statute the President made rules and regulations concerning the sale of intoxicating liquors, but did not provide by the rules so pro-

mulgated any regulation relating to the sale of intoxicating liquors, except for mechanical, medicinal, and scientific purposes.

Seetion 1955 of the Revised Statutes, above cited; imposes certain penalties, i. e. "a fine of not more than $500.00, or imprisonment for more than six months."

By reference to this Statute it will be observed that the penalties provided for are not imposed for the *importation, manufacture.* or *sale* of intoxicating liquors into and within the Territory of Alaska, nor for the violation of any *Statute prohibiting the importation, manufacture,* or *sale* of *intoxicating liquors* into or within the Territory of Alaska, but it provides that they may be *imposed* for the *willful violation* of the REGULATIONS made by the PRESIDENT. Until there are REGULATIONS to violate there is no PENALTY to impose.

Section 14, of the Civil Government Act, provides that the importation, manufacture and sale of intoxicating liquors in said district, except for certain purposes enumerated in the Statute, is prohibited under the *penalties* which are provided in *Section 1955 of the Revised Statutes*, and this statute is kept in full force. As above stated, this section provides for no penalty, except for the *willful violation* of the PRESIDENT'S RULES; therefore, we contend that until the President shall make rules regulating the sale of liquor that the said section 14 of the Civil Government Act is inoperative.

From the records of this case there can be no reasonable contention that the plaintiff in error has *violated* any *rule* or *regulation* made by the *President.* Therefore he is not subject to any penalty and should have been discharged.

Again, under section 1955 no power is given to the President except to *restrict, regulate* or *prohibit* the *importation* and *use* of distilled spirits. It does not clothe him with power to restrict, regulate, or prohibit the sale or manufacture of intoxicating liquors within the Territory of Alaska.

We contend therefore that there is no law in Alaska prohibiting the acts complained of in this Indictment; the Court however put the defendants on trial.

After the jury had been empaneled and sworn to try this case, and the witness, William Hale, sworn on behalf of the prosecution, the defendants moved the Court to require the District Attorney to elect upon which particular sale he would rely for a conviction; (Bill of exceptions, transcript, p. 53, last par.)

To the ruling of the Court denying said motion the defendants excepted, and now contend that the Court committed an error effecting the substantial rights

of Max Endelman, as set forth in the third assignment of error; (transcript p. 33).

Immediately after the prosecution rested its case, evidence having been introduced tending to prove several distinct and separate sales at different times to different persons, the defendants moved the Court to require the District Attorney to elect upon which sale of liquor attempted to be proven he chose to rely for a conviction; (Bill of exceptions, p. 37).

The Court denied the motion and his ruling is assigned as error. (8th assignment of error, transcript, p. 34).

The third and eighth assignment of error are considered together in this brief.

While the prosecution has offered evidence tending to prove several distinct and substantive offences it is the duty of the Court upon the motion of the defendant to require the prosecution, before the defendant is put upon his defence to elect upon which particular transaction the prosecution will rely for a conviction.

State vs. Schweiter, 27 Kan. 500-512.
State vs. Crimmins, 2 Pac. Rep. 574.
State vs. Hahn, 2 Pac. Rep. 574.
See opinion, p. 576, beginning with the last par.
State vs. O'Connell, 2 Pac. Rep. p. 579.
State vs. Guettler, 9th Pac. Rep. p. 200.

Justice Valentine in his opinion in State vs. Crimmins, clearly disposes of this proposition of law in the followlug language:

"ANY OTHER RULE WOULD OFTEN WORK INJUSTICE AND HARDSHIP TO THE DEFENDANT. IF ANY OTHER RULE WERE ADOPTED, THE DEFENDANT MIGHT BE CHARGED WITH A COMMISSION OF ONE OFFENCE, TRIED FOR FIFTY, COMPELLED TO MAKE DEFENCE TO ALL, BE FOUND GUILTY OF AN OFFENCE FOR WHICH HE HAD MADE NO PREPARATION AND HAD SCARCELY THOUGHT OF, AND FOUND GUILTY OF AN OFFENCE WHICH WAS REALLY NOT INTENDED TO BE CHARGED AGAINST HIM; AND, IN THE END, WHEN FOUND GUILTY, HE MIGHT NOT HAVE THE SLIGHTEST IDEA AS TO WHICH OF THE OFFENCES HE WAS FOUND GUILTY. ALSO IF EVIDENCE WAS INTRODUCED TENDING TO PROVE TWELVE OR MORE DIFFERENT OFFENCES THE JURY MIGHT FIND HIM GUILTY, WITHOUT ANY TWO OF THE JORORS AGREEING THAT HE WAS GUILTY OF ANY PARTICULAR ONE OF SUCH OFFENCES. ONE JUROR MIGHT BELIEVE

THAT HE WAS GUILTY OF ONE OFFENCE, ANOTHER JUROR OF ANOTHER, AND SO ON WITH RESPECT TO ALL OF THE JURORS AND ALL THE OFFENCES, EACH JUROR BELIEVING THAT DEFENDANT WAS GUILTY OF SOME ONE OF THE OFFENCES WHICH THE EVIDENCE POSSIBLY TENDED TO PROVE, BUT NO TWO JURORS AGREEING THAT HE WAS GUILTY OF THE SAME IDENTICAL OFFENCE."

The law requiring the District Attorney to elect in such cases is in furtherance of justice; hence, the refusal of the Court below to require the prosecution to elect upon which one of the sales attempted to be proven it would rely upon for conviction was material error, or affecting the substantial rights of the defendants.

After the Court having refused to require the District Attorney to elect upon which sale he would rely for a conviction defendants' motion to discharge the defendants, made at the close of the prosecution, should have been granted; (Bill of Exceptions, transcript, p. 56, and the 7th assignment of error, transcript, p. 34;) for the reason that the defendants should not have been required to interpose any defence to an indictment so vague, indefinite, and uncertain, and for the further reasons set forth in said motion.

The Court committed manifest error, as set forth in the fifth assignment of error; (transcript, p. 34.)

The Court permitted the prosecution to prove any number of sales to any number of persons at any time within one year prior to the date of the indictment and without requiring the District Atttorny to state the several offences alleged to have been committed in separate counts in the indictment, or to elect upon which offence he would rely for a conviction, compelled the defendants to go to trial without any knowledge or information as to what charge the prosecution intended to convict, and after conviction would leave the defendants without the slightest idea as to which of the offences they were found guilty. The orders of the Court below inflicted upon defendants an injustice against which they have no remedy, except in this Court.

The theory of the prosecution during the trial of these defendants was that they and each of them had committed several separate and distinct offences by selling intoxicating liquors to several persons at different times and upon this theory the Court permitted them to try the case and allowed the prosecution, over the objection of the defendant to prove any number of sales to any number of persons and at any time within one year prior to the date of the indict-

ment without any reference as to whether the defendants were charged in the indictment with sales to those persons. The testimony introduced failed to disclose any sale of liquor to John Doe or Richard Roe; the only two persons named in the indictment to whom liquor was alleged to be sold; thus leaving the defendants absolutely ignorant and entirely helplesss to prepare a defence and in this condition they were forced to trial by the Court.

At the trial the defendant Max Endelman offered in evidence in his behalf a special tax stamp, issued by the Collector of Internal Revenue for the District of Oregon, which includes the District of Alaska; (bill of exceptions, transcript, pages 58 and 59, for copy of stamp.) The Court refused to allow the same to be introduced in evidence, and his refusal is assigned as error; (ninth assignment of error, transcript, p. 35.)

The evidence offered clearly shows that so far as the Government of the United States is concerned the defendant had complied with all of its rules and regulations relating to the revenue law. It clearly shows that Max Endelman had paid the tax required by the government from a person engaged in the business of a retail liquor dealer at Juneau, Alaska, from July 1st, 1896, to July 1st, 1897. We contend that the defendant had the right to have the fact that he had paid his tax considered by the jury for the purpose of showing that he had complied with the Revenue laws, and had acted in good faith towards the government of the United States, and for the further reason that it bears directly upon the question of intent. When the government of the United States took the defendant's money for a tax on his business as a retail liquor dealer at Juneau, Alaska, he had the right to suppose that he could follow that business unmolested by the government that received his money and issued its receipts and required him, under severe penalties, to place and keep the stamp, or receipt, conspiciously in his establishment or place of business. If the defendant honestly believed, (and he had a perfect right to believe), that after paying this tax, which was received by the government, that he had the right to pursue the business for which he had paid the tax in Alaska, he was not guilty of any crime; intent to violate the law or commit a crime is one of the essential elements necessary to constitute a crime.

It will also be observed that there is printed in red ink upon the face of the revenue stamp offered in evidence the following words and figures:

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement or continuation of such business contrary to the

laws of said State, or in places prohibited by municipal laws." (Transcript, p. 59).

If the defendant was conducting a retail liquor business within any State or municipal corporation this would clearly be a notice to him that the tax receipt did not exempt him from any penalty or punishment provided for by the laws of such State, or municipal corporation. In Alaska there is no State or municipal law regulating the sale of intoxicating liquors to violate; the defendant then would only be guilty, if guilty at all, of violating some law of the general government.

Is it reasonable to say that the defendant would believe that the Government would tax his business and take his money in payment of such tax and then prosecute him for carrying it on? If the defendant can be charged with the knowledge that it is unlawful to sell liquor in Alaska, the government of the United States, which enacted the law, should at least be charged with equal knowledge. If the Government intended to prosecute persons for carrying on the retail liquor business in Alaska, was it not the plain duty of the Government to so inform the defendant at the time he applied for the revenue stamp and refuse to sell it to him? Was it not reasonable for the defendant to suppose that when he paid his money and the Government received it that so far as the Goverment was concerned that he would be permitted to carry on the business? Defendant surely thought so, and he had a perfect right to think so; hence the contention that the Court erred in refusing to admit the evidence. If the Court's position was correct the Government has surely taken an anomalous position in these cases, by receiving some of the fruits of an unlawful business and then prosecuting the other party to the crime.

In connection with the ninth assignment of error we desire to call the Court's attention to subdivision eight of the tenth assignment of error; (p. 37 of the transcript), and to that portion of the Court's charge to the jury bearing upon the offer of the defendants to introduce the revenue stamp above referred to. (charge of the jury, transcript, p. 19).

We contend that inasmuch as the Court excluded the testimony and refused to allow the jury to consider it, that it was error for the Court to instruct the jury in relation to the testimony so excluded; that the Court has no right to comment upon or instruct the jury in regard to any testimony offered and excluded by him; that in so doing the jury is liable to be confused and the defendant suffer thereby.

The Court erred in charging the jury as set forth in the tenth assignment of error, (transcript, page 35), to which instructions the defendants duly excepted. (Bill of exceptions, transcript, p. 60).

The Court instructed the jury "that the fact that it was a glass, pint, or quart, cuts no figure, as the law authorizes the allegation to be made in that way," tended to mislead the jury, they having the right to conclude from the instructions that if they found that the defendants had sold any quantity of liquor to any person within a year previous to the date of the indictment that it became their duty to find the defendant guilty without reference to his opportunities of having any knowledge of what particular offence the Government would attempt to prove against him, and without any opportunity of preparing a defense or meeting the allegation.

The Court committed manifest error in giving instructions to the jury, as set forth in the 12th paragraph of the 10th assignment of error; (transcript, p. 39); to the giving of such instructions the defendant duly excepted. (Bill of exceptions, par. 12, p. 64).

As to whether the defendants were guilty or not is a question of fact to be determined by the jury, and not by the Court. The Court has no right in his charge to the jury in criminal cases to express an opinion as to the guilt or innocence of the defendants. This is wholly the province of the jury.

U. S. vs. Battiste, 2nd Sum. 234.

Settinius vs. U. S., 5 Cranch, C. C. 584.

Some of the authorities hold that a judge in civil cases may express his opinion on the *weight* of evidence, and in cases where the jury is likely to be influenced by their prejudice it is well for him to do so, but care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory and is in no wise intended to fetter the exercise finally of their own independent judgment, and even in these cases if the language of the Court be intemperate and unfair though it does not withdraw the facts from the consideration of the jury it is ground of reversal. Striking and intense expressions when used by a judge can only mislead instead of aiding a jury in arriving at a correct conclusion as to the facts. All comments upon evidence by the Court should be given in a cool, dispassionate manner, and should be a fair statement calculated to aid and assist the jury rather than to mislead them or coerce them into the belief entertained by the Court. Such expressions as: "*I do not see any way that these defendants can be acquitted*," can only produce one impression in the minds of the jury. It is such an expression that might be expected to fall from the lips of the prosecuting attorney, bat never from a trial judge in his charge to the jury.

U. S. vs. 14 Packages, Gilp. 335.
" " Sarchet, " 273.
Lynn " Commonwealth, Penn. St., 288.

It will be observed that the Court in his charge to the jury in no place commented upon the evidence given by the different witnesses at the trial, or explained to the jury the effect of such evidence, but after having instructed them as to what the Court considered the law to be and near the close of his charge he practically told the jury that it was their duty to convict the defendants and to render a verdict of guilty as charged in the indictment. This is clearly a ground of reversal. Trial judges should never be permitted to so far invade the functions of the trial jury.

The Court committed manifest error in giving the instructions as found in the first and second paragraphs of the 11th assignment of error, (transcript, p. 29). To the giving of these instructions the defendants duly excepted. (See bill of exceptions, p. 65).

We contend that the Court did not correctly state the law of principal and agent, servant, or employe. We concede the law to be that if an agent acting for his principal and within the scope of his authority violates a penal statute that the principal may be found guilty. But if the agent violates a penal statute and commits a crime who does not act within the scope of his authority the principal cannot be held criminally liable for the acts of his agent. The Court should have so instructed the jury. The only inference the jury could draw from the instructions of the Court, as given, would be that the principal in every event would be guilty of every criminal act committed by his agent during the time the relation of principal and agent existed. This is clearly not the law, and we contend that the Court should have charged the jury that if they found that liquor had been sold by the agents, servants, or employes of the defendant Max Endelman, acting within the scope of their authority and under iustructions and with the knowledge of the principal, then the principal would be liable, but not otherwise. A principal cannot be charged with the criminal acts of his agents unless he has knowledge of or acquiesced in those guilty acts.

All of which is respectfully submitted.

CREWS & HANNUM and C. S. BLACKETT,

Attorneys for Plaintiff in Error.

No. 357.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MAX ENDLEMAN and
EDWARD LORD,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE UNITED STATES.

BURTON E. BENNETT,
United States Attorney.

H. S. FOOTE,
U. S. Att'y Northern District
of California, Of Counsel.

No. 357.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAX ENDLEMAN and
EDWARD LORD,
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vs.

THE UNITED STATES OF AMERICA,
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BRIEF OF THE UNITED STATES.

STATEMENT.

At the adjourned November term of the United States District Court for the District of Alaska, Max Endleman and Edward Lord were indicted by the Grand Jury for unlawfully selling intoxicating liquor in the District, in violation of what is known as the prohibitory liquor law of Alaska. This law is found in Section 1955 of the Revised Statutes of the United States, Section 14 of Chapter

53, of Volume 23, of the United States Statutes at Large, and the rules and regulations prescribed by the President in conformity therewith. Section 1955 of the United States Revised Statutes is as follows:

"The President shall have power to restrict and regu-
" late or to prohibit the importation and use of fire arms,
" ammunition, and distilled spirits into and within the
" Territory of Alaska. The exportation of the same from
" any other port or place in the United States, when des-
" tined to any port or place in that territory, and all such
" arms, ammunition, and distilled spirits, exported or at-
" tempted to be exported from any port or place in the
" United States and destined for such territory, in viola-
" tion of any regulations that may be prescribed under
" this section, and all such arms, ammunition, and dis-
" tilled spirits landed or attempted to be landed or used
" at any port or place in the territory, in violation of such
" regulations, shall be forfeited; and if the value of the
" same exceeds four hundred dollars the vessel upon
" which the same is found, or from which they have been
" landed, together with her tackle, apparel, and furniture
" and cargo, shall be forfeited; and any person willfully
" violating such regulations shall be fined not more than
" five hundred dollars, or imprisoned not more than six
" months. Bonds may be required for a faithful observ-
" ance of such regulations from the master or owners of
" any vessel departing from any port in the United States
" having on board fire arms, ammunition, or distilled spir-
" its, when such vessel is destined to any place in the ter-
" ritory, or if not so destined, when there is reasonable

" ground of suspicion that such articles are intended to " be landed therein in violation of law; and similar bonds " may also be required, on the landing of any such articles " in the territory, from the person to whom the same may " be consigned."

Section 14 of Chapter 53 of Volume 23 of U. S. Statutes at Large is as follows:

"That the provisions of Chapter three, title twenty- " three, of the Revised Statutes of the United States, re- " lating to the unorganized territory of Alaska, shall re- " main in full force, except as herein specially otherwise " provided;

" And the importation, manufacture and sale of intoxi- " cating liquors in said District except for medicinal, me- " chanical and scientific purposes, is hereby prohibited, " under the penalties which are provided in Section nine- " teen hundred and fifty-five of the Revised Statutes, for " the wrongful importation of distilled spirits.

"And the President of the United States shall make " such regulations as are necessary to carry out the pro- " visions of this section."

Endleman ran what is known as the Louvre Theatre, in Juneau, Alaska, the theatre being in the back part of the building, and the bar in the front part. In the evening the large double doors connecting the two rooms were thrown open, and the whole floor was practically one room. In the theatre part there was an upstairs with boxes which were connected with the bar by electric bells used by patrons to summon waiters so as to order, through them, from the bar, intoxicating liquor. Liquor

was also sold in all parts of the house, if ordered, as well as at the bar. Lord was one of Endleman's barkeepers. They were charged with having sold whiskey in that place, to divers persons, on or about the 7th day of December, 1896, and at divers other times before. Evidence was introduced showing sales to various persons at various times, within one year previous to said 7th day of December, 1896. The defendants, in the Court below, offered no evidence. The jury acquitted Lord, but could not agree as to Endleman, and was discharged. Endleman was immediately re-tried before another jury, and found guilty as charged.

ARGUMENT.

1.

The Court below very properly denied defendant's motion to quash the indictment.

The material part of said indictment is as folows:

"That said Max Endleman and Edward Lord, at or near "Juneau, within the said District of Alaska, and within "the jurisdiction of this Court, on or about the 7th "day of December, in the year of our Lord one "thousand eight hundred and ninety-six, and at divers "other times before, did unlawfully and willfully sell to "John Doe and Richard Roe, and to divers other persons, "whose real names are to the Grand Jurors unknown, "an intoxicating liquor called whisky, to wit, one glass, "pint, quart, gallon of said liquor, the real quantity is

" to the Grand Jury aforesaid unknown, without having " first complied with the law concerning the sale of intox- " icating liquors in the District of Alaska."

Counsel for defendant Endleman contend that two or more offenses are charged in the indictment. In order to have their contention logical, we must suppose that at times Endleman could have lawfully sold whisky in Alaska, or that he could have lawfully sold it to certain persons, or that he could have lawfully sold it in certain quantities. As a matter of fact he was absolutely prohibited from selling whisky in Alaska. The gist of the offense is the selling of the whisky, and with that crime he is charged in the indictment, and it was sustained when it was shown that he had made sales that were not barred by the statute of limitations.

Nelson *vs.* United States, 30 Fed., page 112, *et seq.*
2 Wharton Crim. Law, paragraph 1510.
Black on Intoxicating Liquors, par. 464, and the many cases cited.

It is not necessary to name the persons who purchased the whisky, or that their names were unknown to the Grand Jury. In this case, however, the Grand Jury did state that their names were unknown.

State *vs.* Bielby, 21 Wis., 204.

It is, we think, a good thing to show a reasonable number of sales of whisky by the defendant, so as to make out as strong a case as possible for the jury, to show that he is keeping a saloon and is pursuing the business of a

retail liquor dealer, and violating the prohibitory liquor law of Alaska. The offense consists in selling whisky in violation of this law, and it is necessary to prove one or more sales. Therefore, even though a particular sale is alleged in the indictment, it is not necessary to allege to whom it was sold.

> Mansfield *vs.* State, 17 Tex. App., page 468.
> State *vs.* Muse, 4 Dev. & B., page 319.

We contend that it is immaterial whether or not any vendee is named in the indictment, or whether one, two, or more are named. We do not believe that counsel for defendant Endleman are seriously contending that they, or any one else, might have believed that John Doe and Richard Roe, named in the indictment, were real persons. The mode of procedure in this case was according to the laws of Oregon, as they existed in 1884, when what is called as the Organic Act of Alaska was passed by Congress. The Oregon Criminal Code, at paragraph 80, declares that the indictment is sufficient if it can be understood therefrom "(1) that the act charged as a crime" is "clearly and distinctly set forth in ordinary and concise "language, in such a manner as to enable a person of "common understanding to know what is intended," and (2) that such act "is stated with such a degree of certainty "as to enable the Court to pronounce judgment, upon a "conviction according to the right of the case."

But one crime is charged in the indictment. Selling intoxicating liquor is but one crime. If Congress had thought it wise, it could have passed a law that running

a saloon and maintaining a liquor nuisance to which people resorted in Alaska was a crime. If this had been done by Congress, in charging a person in the same indictment with violating that law, as well as the one prohibiting the sale of intoxicating liquor, it would have been necessary to do it in two counts.

State *vs.* Lund, 30 Pac., 518.

We submit that the indictment squarely informed defendant Endleman of what he was charged and of what law he violated.

2.

The Court below very properly overruled defendant's demurrer to the indictment.

Alaska was acquired by the United States by purchase from Russia. Alaska belongs to the United States, and it has a right to govern it as it sees fit.

Story, Const., par. 1324.

It has never thought best to grant Alaska a Legislature, but makes the laws for Alaska through Congress. In 1884 when Congress passed what is known as the Organic Act, it was expressly provided therein that intoxicating liquors should not be sold as a beverage in Alaska. That it has the power to so legislate is well settled.

Nelson *vs.* United States, 30 Fed., page 112 *et seq.*

When Congress so legislated it assumed the combined powers of the Federal and State governments and had a right so to do.

American Ins. Co. *vs.* Canti, 1 Pet., 546.

I take it for granted that it is now well settled that a State has power to pass a prihibitory liquor law. Such being the case, Congress has the power to pass a prohibitory liquor law, as well as a State, and such a law does not in any manner conflict with the Constitution of the United States.

State *vs.* Lindgrove, 41 Pac., 688; Kan App., page 51.

It is thus seen that Congress has all the powers to govern Alaska that Alaska would have to govern itself were it a State. And it follows that Congress has the absolute power to prohibit the manufacture and sale of intoxicating liquor in Alaska. In Crowley *vs.* Christensen, 137 U. S., at page 91, the Court most ably expressed the opinion of the thinkers of the present day when it said: "There "are few sources of crime and misery equal to the dram-"shop. * * * Not only may a license be exacted "from the keeper of the saloon before a glass of his li-"quors can be thus disposed of, but restrictions may be "imposed as to the class of persons to whom they may be "sold, and the hours of the day, and the days of the week, "on which the saloon may be opened. Their sale in that "form may be absolutely prohibited. It is a question of "public expediency and public morality, and not of Fed-"eral law. The police power of the State is fully compe-"tent to regulate the business, to investigate the evils, "or to suppress it entirely. * * * As it is a business "attended with danger to the community, it may, as has "already been said, be entirely prohibited. * * * It "is a matter of legislative will only."

The sale of intoxicating liquors in Alaska is entirely with Congress, and is a matter of legislative will only. Congress used its power, and absolutely prohibited the sale of intoxicating liquors in Alaska, which it had full authority to do.

Cantini *vs.* Tillman, 54 Fed., page 969, *et seq.*

Nor is such legislation repugnant in any way with the Constitution of the United States.

Cantini *vs.* Tillman, 54 Fed., page 969, *et seq.*
Beer Co. *vs.* Massachusetts, 97 U. S., page 25.
Foster *vs.* Kansas, 112 U. S., page 201.
Mugler *vs.* Kansas, 123 U. S., page 623.
Black on Intoxicating Liquors, paragraphs 37, 80 to 90, both inclusive, and the large number of authorities cited thereunder.

In Mugler *vs.* Kansas, 123 U. S., Mr. Justice Harlan, in delivering the opinion of the Court, said: "That legis-"lation by a State prohibiting the manufacture within "her limits of intoxicating liquors to be there sold or bar-"tered for general use as a beverage, does not necessarily "infringe any right, privilege, or immunity secured by "the Constitution of the United States, is made clear by "the decisions of this Court, rendered before and since "the adoption of the Fourteenth Amendment, to some "of which, in view of the questions to be presently con-"sidered, it will refer." He then reviewed the following cases:

License Cases, 5 How., 504.

Bartemeyer *vs.* Iowa, 18 Wall., 129.

Beer Co. *vs.* Massachusetts, 97 U. S., 25.

Foster *vs.* Kansas, 112 U. S., 201.

Intoxicating liquors cannot be imported into the District of Alaska in original packages, or otherwise, or at all. Chapter 728 of Volume 26 of the United States Statutes at Large entirely disposes of this question. It reads as follows:

"That all fermented, distilled, or other intoxicating "liquors transported into any State or Territory, or re- "maining therein for use, consumption, sale, or storage "therein, shall upon arrival in such State or Territory, "be subject to the operation and effect of the laws of such "State or Territory, enacted in the exercise of its police "powers, to the same extent and in the same manner as "though such liquids or liquors had been produced in such "State or Territory, and shall not be exempt therefrom "by reason of being introduced in original packages or "otherwise."

That Congress has the power to govern Alaska is unquestioned. It follows from the fact that it belongs to the United States. In such governing, in exercising the police powers incidental thereto, it has the power to absolutely prohibit the manufacture, importation, and sale of intoxicating liquors in the territory, as it has done.

In re Rahrer, 140 U. S., page 545, *et seq.*

That the police power is distinct from the commercial power is shown in the last above cited case. At times the police power and commercial power nearly run into each other.

Brown *vs.* State of Maryland, 12 Wheat., 441.

The contention of counsel for the defendant that there is no law prohibiting the sale of intoxicating liquors in the District of Alaska is, we think, entirely wrong. Section 14 of Chapter 53 of Volume 23 of the United States Statutes at Large says, among other things:

"And the importation, manufacture and sale of intoxi-
"cating liquors in said District, except for medicinal, me-
"chanical and scientific purposes, is hereby prohibited
"under the penalties which are provided in Section nine-
"teen hundred and fifty-five of the Revised Statutes, for
"the wrongful importation of distilled spirits.

"And the President of the United States may make
"such regulations as are necessary to carry out the provi-
"sions of this section."

It will be observed that the manufacture, importation, and sale of intoxicating liquors in Alaska, except for certain prescribed purposes, are absolutely forbidden by this section. To find out what the penalty is for breaking this law, we simply turn back to Section 1955 of the Revised Statutes.

3.

A prohibitory law is different from a law which aims to regulate the liquor traffic. In the one case, no sales are allowed; while in the other, liquor may be sold under certain conditions. In the one case, all sales are illegal, in the other, some are legal and some are not. Therefore, with such a law as Alaska possesses, there is no reason why the gov-

ernment should be compelled to rely upon any particular sale. If the jury believe from all the evidence in a case, that the defendant sold intoxicating liquor in Alaska, and the same is not outlawed, then he is found guilty as charged. He is not found guilty of any particular sale, but of selling. To hold otherwise would be most oppressive for the government, for juries in Alaska will acquit if the least reason can be found for them to do so. It has taken 17 years to secure a conviction from a petit jury in a liquor case. If the government is compelled to rely upon some one particular sale, while the jury may be satisfied beyond any doubt that the defendant is guilty, it gives it a chance to at least not agree. There is no reason for any such rule as this. The offense, when committed, is that of selling intoxicating liquor, when the selling of the same is entirely prohibited. Even in States where the law is not strictly prohibitory, as this law is, other sales are allowed to be proven other than those set out in the indictment.

State *vs.* Smith, 22 Vt., page 74.

State *vs.* Croteau, 23 Vt., page 14; 54 Am. Dec., page 90.

4.

The Court below very properly allowed the plaintiff to show any sales of whisky made by the defendant within one year previous to obtaining the indictments against him. The gist of this offense is, as we contend, the selling of whisky, and particular sales to particular persons at particular times has nothing to do with it. If the de-

fendant sold any intoxicating liquor in Alaska, he committed a crime, and if the same is not barred by the statute of limitations, he was properly prosecuted therefor.

State *vs.* Rem, 41 Kan., page 674.

The special tax stamp of the defendant was properly excluded as evidence for him by the Court, as he was not being prosecuted for violating the Revenue Laws of the United States, but the local prohibitory Act of Alaska. In Maine and Massachusetts it has been declared by statute that it is *prima facie* evidence that a person is selling intoxicating liquors, if he has a special tax stamp. These statutes have been declared to be valid, and only declaratory of the common law.

Comm. *vs.* Uhrig, 146 Mass., page 132.

5.

The Court below very properly instructed the jury as to the law of this case, and when it stated that "the fact "that it was a glass, pint, quart, cuts no figure, as the "law authorizes the allegation to be made in that way." The quantity or amount of liquor cuts no figure, but only the sale. The prohibitory law of Alaska is different from the laws of some of the States where liquor is allowed to be sold in certain quantities, for instance, not more than a quart at a time. In such case, the quantity is material, and it would be necessary to allege that not more than one quart was sold. In this case, the Grand Jury said, in the indictment, that the exact quantity of whisky sold by the defendant was to them unknown.

6.

The Court below very properly instructed the jury as follows:

"The Federal Courts allow the Judges sometimes to "give an opinion on the evidence. I gave my judgment "to the other jury, and I will give it to you. I do not "see any way that these defendants can be acquitted, "notwithstanding I charge you that you are the judges "of the evidence, and, from that evidence, it is for you "to say whether or not they, or either of them, are "guilty."

In the State Courts where, from the undisputed testimony, it is evident that no other verdict than the one arrived at could have been returned, the instructions of the Judge are immaterial.

Martin *vs.* Union Mutual Insurance Co., 13 Wash., page 275.

Hardin *vs.* Mullin, 16 Wash., page 647.

In criminal cases in Federal Courts, Judges have even gone so far as to instruct the jury to convict the defendant.

United States *vs.* Anthony, II Blatch., page 200.

This practice has been severely criticised, but the rule is well settled that they have a right to express their opinion to the jury.

United States *vs.* Taylor, 3 McCrarry, page 500, *et seq.*

4 Fed. R., page 470, *et seq.*

Wharton, Crim. Law (7th Ed.), par. 82a.

In this case the Court below expressly said, after expressing its opinion, "notwithstanding I charge you that "you are the judges of the evidence, and from that evi- "dence it is for you to say whether or not they, or either "of them, are guilty." The charge was clear and fair, although from the evidence, no other conclusion could be reached than that the defendant was guilty.

7.

The Court below very properly instructed the jury as to the law in regard to principal and agent, servant, or employee, and its instructions were correct.

A person is guilty of unlawfully selling intoxicating liquor when it is supported by proof that he sold by his servant, agent, or employee.

Comm. *vs.* Park, 1 Gray, 553.
Parker *vs.* State, 4 Ohio St., 563.

And evidence that the sale was made in defendant's barroom or saloon, by a barkeeper or person apparently in charge there is *prima facie* evidence of the knowledge and consent of the owner.

Kirkwood *vs.* Autenreith, II Mo. App., page 515.
Amerman *vs.* Kall, 34 Hun., 126.

And a conviction for selling intoxicating liquor has even been sustained where a man went to defendant's saloon on Sunday, and, he (the defendant) not being present, was told by a boarder to help himself from a certain bottle, which he did, leaving the price thereof on the counter.

Black on Intoxicating Liquors, paragraph 510.
Pierce *vs.* State, 109 Ind., 535.

CONCLUSION.

We respectfully submit that the Court below, in this case committed no reversible errors, and that the judgment thereof should be sustained.

BURTON E. BENNETT,
United States Attorney.

ADDENDA.

If the Congress of the United States does not possess the power under the Constitution, to restrict the sale and importation of intoxicating liquors into a territory such as Alaska, then it must follow according to the theory advanced by the plaintiff in error, since Alaska has no Legislature, that there is no legislative power which can make regulations in that behalf, and the citizens of such territory would have no protection whatever against the evil of unrestricted importation and sale of liquors, with all the evils which might confessedly flow therefrom; and no power whatever exists anywhere to regulate commerce as affecting Alaska.

The contention of the plaintiff might perchance have some plausibility, if there was any legislative body in Alaska.

But the whole power of legislating for that territory seems to be vested in the Congress of the United States, and to suppose that the framers of the Constitution of the United State sintended to leave the citizens of any territory which might be acquired by the United States by purchase or treaty, without any protection in this regard, would be to make it a peculiar hardship on such territory and its citizens, and to cast a very severe reflection both on the patriotism, and the good sense of the makers of that venerated instrument, the charter of all our rights as a great and civilized nation.

The Constitution of the United States it is true does reserve to the States all rights not granted therein to the general government, but the States own the territories in common, and their representatives legislating for the preservation of such reserved rights, it would seem, have the power to pass just such an intoxicating liquor law as the one under discussion.

If, therefore, the States, who own in common, the territory of Alaska, by their Congress, choose to legislate as to one of the rights reserved to all such States in common, and to prohibit the importation and sale of intoxicating liquors into their territory, it would seem that they have the right to do it.

Whenever any citizen of the United States, is in a territory which belongs to the States in common, he is there with full knowledge of the power possessed by the States, through their Congress, and if he goes there with such knowledge, how can he justly complain, of the exercise of a power inherent by the Constitution in the States?

It seems to me that there is no other sound Constitutional theory, than the contention here made, which would reserve to the States as to their common territory, the rights guaranteed to them by the Constitution.

It does not look reasonable that a territory without a legislative body, and which belongs to the States in common, can have as great a right as the States, which have the attribute of sovereignty and possess legislative bodies; and neither sovereignty inheres in the territory under the Constitution, or does any legislative body exist in

the territory which can make any laws on the subject. The basis of all the decisions as to this matter cited by counsel in support of their position seems to point unerringly to the proposition, that the States have reserved rights, but that as to the territories, the common property of the States, Congress alone can legislate as to common property of the States, especially where no territorial Legislature exists.

It would be a heavy blow struck at the sovereign rights of States, and the power of their Congress to deny the Constitutionality of such a law, and to leave Alaska, and all other territories which may hereafter be acquired by the States, without any law on the subject of the importation and sale of intoxicating liquors. Congress has the right to admit new States into the Union, and to prescribe what kind of Constitutions they must possess, so that it be republican in form.

As was the case in reference to the institution of slavery, Congress had the right to demand that States seeking admission must prohibit the further existence of that institution.

So also as in the case of Utah, Congress had and exercised the right to prohibit polygamy, in the new State. To declare, at this date, and in view of the history of our common country, and the decisions of the Courts of last resort, that Congress has no power to pass such a law as that now under consideration, would be to erect into sovereign States territories which have never yet been so declared by Congress, to exist as sovereign States of the Union. So it would happen if

No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,

Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the Last Will and Testament of Edgar Mills, Deceased,

Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

INDEX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ALBERT E. GRAY,

Plaintiff,

vs.

S. PRENTISS SMITH *et als.*,

Defendants.

Statement under Amendment to Section 7 of Rule 23, Adopted February 17th, 1896.

A. E. Gray, the plaintiff in error, herewith files a statement of the errors in which he intends to rely in the above entitled action, and of the parts of the record which he thinks necessary for the consideration thereof.

STATEMENT OF ERRORS.

1—The Court erred in deciding that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market Street lot.

2—The Court erred in giving judgment against the plaintiff and for the defendants for their costs, because Edgar Mills, having refused to take the title of said Market Street lot, and having given notice to plaintiff, that, because of such alleged defect in title, he refused

to carry out his contract for the purchase from the plaintiff of said Market Street lot, became and was liable to the plaintiff for such breach of his contract without regard to plaintiff's ability to pay said Donohoe the purchase price demanded by him for said Market Street lot.

3—The Court erred in giving judgment against the plaintiff and for the defendants for their costs.

PARTS OF THE RECORD DESIRED TO BE PRINTED.

Fourth Amended Complaint. (Pages 1 to 11 inclusive.)

Answer to the Fourth Amended Complaint. (Pages 18 to 28 inclusive.)

Findings. (Pages 29 to 44 inclusive.)

Bill of Exceptions, omitting therefrom the findings, which are set forth in the transcript of the record commencing on line 12, page 70, and ending on line 8, page 85, and inserting in lieu of the findings so omitted, after the word "following," on line 12, page 70, the words ("Here follows true copy of findings"). Then add without setting out copy of same—Petition for writ of error, filed, etc. Bond approved, filed, etc. Writ of Error and Answer thereto, filed, etc. Citation, filed, etc.

March 19, 1897.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Plaintiff in Error.

[Endorsed:] Service admitted, March 19, 1897. Denson & DeHaven.

Filed March 19, 1897. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Northern District of California, Ninth Circuit.

ALBERT E. GRAY,
Plaintiff,
vs.
S. PRENTISS SMITH, FRANK MILLER, and WILLIAM P. HARRINGTON, Executors of the last Will and Testament of Edgar Mills, Deceased,
Defendants.

Fourth Amended Complaint.

Albert E. Gray, a subject of Victoria, Queen of Great Britain and Ireland, and Empress of India, an alien, by this his fourth amended complaint, complains of S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the last will and testament of Edgar Mills, deceased, all of said defendants being residents and citizens of the State of California, and thereupon plaintiff alleges and avers the citizenship and residence of the parties herein as hereinabove set forth.

II.

That on or about the 7th day of October, 1891, the plaintiff and said Edgar Mills, who was during his life-

time a resident and citizen of the State of California, entered into mutual written agreements signed by both of them, wherein and whereby the plaintiff agreed to sell and convey to said Edgar Mills by a good and sufficient deed free of all incumbrances, and the said Edgar Mills agreed to buy from plaintiff the following lot of land, situate in the City and County of San Francisco, State of California :

Commencing at a point in the southeasterly line of Market Street distant thereon two hundred and seventy-five (275) feet northeasterly from the point of intersection of the northeasterly line of Eighth Street, formerly Price Street, with the said southeasterly line of Market Street; thence northeasterly along the last mentioned line eighty-two feet and six inches ; thence southeasterly and parallel with Eighth Street one hundred and sixty-five (165) feet to the northeasterly line of Stevenson Street ; thence southwesterly along the last mentioned line eighty-two (82) feet and six (6) inches, and thence northwesterly one hundred and sixty-five feet (165) to the place of beginning, being a subdivision of lot No. 264 of the 100 vara survey, according to map of W. M. Eddy, on file in the office of the County Recorder of said City and County, which is hereinafter styled the Market Street lot; and the said Edgar Mills agreed to pay to the plaintiff as and for the consideration for said Market Street lot the sum of one hundred and twenty thousand dollars ($120,000) in cash, and in addition to convey to the plaintiff in fee free from all incumbrances, certain tracts of land situate in Colusa and Tehama

Counties, State of California, aggregating 8421 acres and briefly known and described as the Eureka Ranch, containing 2400 acres, and Mills' lands at Sites, containing 3281½ acres, both situate in Colusa County, also the Ehorn Ranch consisting of 1060 acres of land belonging to said Edgar Mills, and 400 acres close adjoining the Town of Kirkwood, and 1280 acres belonging to said Edgar Mills a few miles west of the Town of Kirkwood, all situate in Tehama County.

That on said 7th day of October, 1891, the 400 acres of land belonging to the said Edgar Mills close adjoining the Town of Kirkwood, were more particularly described by legal subdivisions as follows:

The south half of the south half of Section 14, and the N. E. ¼ of Section 23, in Township 23 North, Range 3 West, M. D. B. & M., and on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands close adjoining the Town of Kirkwood.

That on said 7th day of October, 1891, the 1280 acres of land belonging to the said Edgar Mills, situate a few miles west of the Town of Kirkwood, were more particularly described by legal subdivisions as follows:

All Section 16, and all Section 17, in Township 23 North, Range 3 West, M. D. B. & M., and on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands situate a few miles west of the Town of Kirkwood.

That on said 7th day of October, 1891, the said Ehorn

Ranch consisted of the following lands more particularly described by legal subdivisions as follows:

All Section 25, the east half of the east half, and the S. W. ¼ of the S. E. ¼ of Section 26, and that portion of said Section 26 beginning at the quarter section corner of the southern boundary line of Section 26; thence running due north 20 chains; thence due east 20 chains; thence north 60 chains to the northern boundary line of said Section 26; thence west along said section line to the intersection of said lands with the line of the Northern railway; thence southerly along the line of said railway to the intersection of the line of said railway with the southern boundary line of said Section 26; thence east along the southern boundary line of said section to the place of beginning; all of said lands hereinbefore described as constituting part of the Ehorn Ranch being situate in Township 23 North, Range 3 West, M. D. B. & M.

Also in Township 23 North, Range 2 West, M. D. B. & M., lots 1 and 2 of the N. W. ¼, and lots 3, 4 and 5 of the S. W. ¼ of Section 30; all of said lands hereinbefore described, situate in Sections 25 and 26 of Township 23 North, Range 3 West, and in Section 30 of Township 23 North, Range 2 West, constituting the Ehorn Ranch.

That on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands designated or known as the Ehorn Ranch.

That on said 7th day of October, 1891, the said Edgar Mills owned certain lands at Sites containing 3281½

acres, more particularly described by legal subdivisions as follows:

In Township 17 North, Range 5 West, M. D. B. & M., all Section 1; the east half of the east half of Section 2; the east half, and the east half of the west half of Section 12; the west half, the S. E. ¼, the west half of the N. E. ¼, and the S. E. ¼ of the N. E. ¼ of Section 10; the west half, and the S. W. ¼ of the S. E. ¼ of Section 14; all Section 15; the N. E. ¼ of Section 22; the N. W. ¼, and the west half of the N. E. ¼ of Section 23.

That the 3281½ acres at Sites referred to in said mutual written agreements were the same lands as are hereinbefore lastly described.

That the following is a more particular description by legal subdivisions of the Eureka Ranch:

In Township 16 North, Range 3 West, Mount Diablo Base and Meridian, all Sections 20, 21 and 29; the north half, and the north half of the south half of Section 28.

That on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands designated or known as the Eureka Ranch.

III.

That said Market Street lot was worth to the plaintiff as of said 7th day of October, 1891, and thereafter down to the date of the breach of the contract hereinafter alleged the sum of one hundred and sixty-five thousand dollars ($165,000), and that said 8421 acres of land were

on said day of the value of one hundred and seventy-three thousand four hundred dollars ($173,400).

IV.

That the plaintiff was able, ready and willing from October 7th, 1891, to and until November 18th, 1891, to sell and convey to said Edgar Mills said Market Street lot by a good and sufficient deed conveying to the said Edgar Mills a perfect title to said lot, but that on said November 18th, 1891, said Edgar Mills refused to buy said lot, or to accept a conveyance thereof, and refused to comply with, or carry out his said agreement to buy said lot as aforesaid, on the ground and for the reason that the title thereto was imperfect; that by reason of such refusal, the plaintiff suffered damages in the sum of one hundred and twenty-eight thousand four hundred dollars ($128,400).

V.

That on the 10th day of January, 1893, the said Edgar Mills died in the City and County of San Francisco, leaving a will, whereof he named the defendants Executors; that on the 26th day of January, 1893, an order was duly made by the Superior Court of the City and County aforesaid, that being the Court having jurisdiction in the matter of the estate of Edgar Mills, deceased, admitting said will to probate and ordering letters testamentary to issue to the defendants. That thereafter defendants qualified as such executors and letters testamentary were issued to them out of said Court and defendants entered upon their duties as such executors, and

have been ever since and are now the duly qualified acting executors of the last will and testament of Edgar Mills, deceased.

That on the 26th day of January, 1893, an order was duly made by said Superior Court in the matter of the estate of Edgar Mills, deceased, ordering publication of notice to creditors, and that in accordance with such order the said executors did on the 30th day of January, 1893, publish for the first time a notice to the creditors of and all persons having claims against the said decedent to exhibit them within ten months after the first publication of said notice to said executors.

VI.

That on the 11th day of September, 1893, the plaintiff duly presented and exhibited to the defendants as such executors, at the place mentioned in said notice, his claim against the estate of said decedent for breach of contract as hereinbefore alleged for the sum of $144,398 inclusive, being the principal sum of $128,400, with interest from November 18th, 1891, for one year and ten months, which claim was accompanied by copies of the said written agreements and was supported by the affidavit of the plaintiff that the amount therein specified was justly due to him, that no payments had been made thereon which were not credited, and that there were no offsets to the same to the knowledge of said affiant, a copy of which said claim is hereto attached marked Exhibit A, and is hereby expressly referred to and made a part of this complaint. That on the 23d day of Septem-

ber, 1893, said claim was by said defendants as such executors rejected in whole.

Wherefore, plaintiff prays judgment against the defendants for the sum of one hundred and twenty-eight thousand four hundred dollars, with interest thereon from the 18th day of November, 1891, and costs of suit.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Plaintiff.

EXHIBIT A.

In the Superior Court, City and County of San Francisco, State of California, Dept. 10, Probate.

In the Matter of the Estate of Edgar Mills, Deceased. } Creditor's Sale.

Letters testamentary of the estate of Edgar Mills, deceased, having been granted to S. Prentiss Smith, Frank Miller and William P. Harrington, the undersigned, a creditor, presents his claim against the estate of said deceased, with the necessary vouchers of said executors for their approval, to wit:

Estate of Edgar Mills, Deceased,

To Albert E. Gray, Dr.

To damages for breach of agreement to buy real property under written contract, a copy of which appears below, date of breach November 18th, 1891...$128,400

To interest on same from November 18th, 1891, to date, 1 year and 10 months..... 16,498

$144,898

On October 7th, 1891, Edgar Mills agreed in writing to buy from Albert E. Gray the following property situate in the City and County of San Francisco: Commencing at a point in the southeasterly line of Market Street distant two hundred and seventy-five (275) feet northeasterly from the point of intersection of the northeasterly line of Eighth (8th) Street, formerly Price Street, with the said southeasterly line of Market Street, thence northeasterly along the last mentioned line eighty-two feet and six inches, thence southeasterly and parallel with Eighth Street one hundred and sixty-five (165) feet to the northwesterly line of Stevenson Street, thence southwesterly along the last mentioned line eighty-two feet and six inches, thence northwesterly one hundred and sixty-five (165) feet to the place of beginning. Being a subdivision of lot No. 264 of the 100 vara lot survey, according to map of W. M. Eddy, on file in the office of the Recorder of said City and County.

The value of said property to said A. E. Gray on said day was $165,000.

The consideration agreed to be paid by Edgar Mills for said San Francisco property was $120,000 cash and 8421 acres of land more or less situate partly in Colusa and partly in Tehama Counties, California, of the value of $173,400.

The said A. E. Gray agreed in writing to sell said San Francisco property to the said Edgar Mills, and was at all times ready and willing to do so, but on November 18th, 1891, said Edgar Mills refused to carry out his agreement.

Copy of contract above referred to.

September 16th, 1891.

To Albert E. Gray, Esq.,
405 California Street,
San Francisco.

Dear Sir:

Provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars ($115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street in this City extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one half (82½) feet by a depth of one hundred and sixty-five (165) feet, at the price of two hundred and forty thousand dollars ($240,000), namely:

In Cash	$125,000
And in land as above	115,000
	$240,000

This offer to hold good for three weeks from this date to enable you to inspect my said lands. Said lands described over page.

Yours &c.,
(Signed) EDGAR MILLS.

(over page) IN COLUSA COUNTY.

My ranch near Colusa Junction, consisting of 2400 acres known as "Eureka Ranch," at $20	$ 48,000
Land at Sites consisting of 3281½ acres at $5	16,400

IN TEHAMA COUNTY.

My ranch known as Ehorn Ranch, consisting of 1060 acres at $30 31,800
Four hundred acres belonging to me close adjoining Kirkwood at $20 8,000
And 1280 acres belonging to me a few miles west of Kirkwood at $15 19,200

$115,400

Say 8421 acres at $115,000.

My agent Mr. Houx will show you the above lands and give you sectional descriptions.

Yours, etc.,

(Signed) EDGAR MILLS.

October 6th, 1891.

Edgar Mills, Esq.,
Pacific Union Club,
San Francisco.

Dear Sir :—

Referring to your letter to me of the 16th September, 1891, wherein you say "provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars ($115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street in this city, extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one-half (82½) feet by a depth of one hundred and sixty-five (165) feet, at the price of two hundred and forty thousand dollars ($240,000), namely:

In Cash..... .....$125,000
And in land as above.... 115,000

$240,000

"This offer to hold good for three weeks from this date to enable you to inspect my said lands thereinafter described."

I now and hereby accept your said offer in the said letter contained.

I am most respectfully,
(Signed) ALBERT E. GRAY.

SAN FRANCISCO, October 7th, 1891.

Dear Sir:—

I hereby accept the modification in the terms of your letter to me of the 16th September, 1891, now made by you, namely:

That you pay in cash one hundred and twenty thousand dollars $120,000
And in lands (as specified in your said letter)..... 115,000

$235,000

Yours respectfully,
(Signed) ALBERT E. GRAY.

To Edgar Mills,
Pacific Union Club,
San Francisco.

I hereby confirm the above and direct you to forward abstract of title to me or my attorneys, Messrs.

(Signed) EDGAR MILLS.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Albert E. Gray, whose foregoing claim is herewith presented to the Executors of the estate of said deceased, being duly sworn, says that the amount thereof, to wit, the sum of $144,898 with accruing interest at the rate of 7 per cent. per annum on the sum of $128,400, is justly due to said claimant. That no payments have been made thereon which are not credited, and that there are no offsets to same to the knowledge of said claimant.

ALBERT E. GRAY.

Subscribed and sworn to before me, this 8th day of September, 1893.

(SEAL.) D. A. CURTIN, Notary Public.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Claimant.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Albert E. Gray, being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing Fourth Amended Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

ALBERT E. GRAY.

Subscribed and sworn to before me, this 18th day of November, 1895.

(SEAL.) D. A. CURTIN, Notary Public.

[Endorsed:] Service of a copy of the within Fourth Amended Complaint is hereby admitted this 19th day of November, 1895.

DENSON & DEHAVEN,
Attorneys for Defendants.

Filed November 19th, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California, Ninth Circuit.

ALBERT E. GRAY,
Plaintiff,
vs.
S. PRENTISS SMITH, FRANK MILLER and WILLIAM P. HARRINGTON, Executors of the Last Will and Testament of Edgar Mills, Deceased,
Defendants.

Answer to Fourth Amended Complaint.

Now come said defendants, and by leave of Court first had and obtained file and present this their answer to the Fourth Amended Complaint therein of said plaintiff and allege that they have no information or belief sufficient to enable them to answer the allegations of the said complaint that the said plaintiff was a subject of Victoria,

Queen of Great Britain and Ireland and Empress of India, an alien, and they therefore deny that at the commencement of this action, or that at any time since, the said plaintiff was or that he now is a subject of Victoria, Queen of Great Britain and Ireland and Empress of India, an alien, or that the said plaintiff was at any of said times or that he now is an alien.

Further answering the said fourth amended complaint, the said defendants deny that the alleged description set out in the said complaint of the land which the said plaintiff agreed to sell and convey to the said Edgar Mills a good and sufficient deed free from all incumbrances and which the said Edgar Mills agreed to buy from said plaintiff, is true and correct, and they allege that the true description of the said land and premises so agreed to be sold and conveyed and purchased is as follows, to wit: The lot of land situate on the south side of Market Street in the said City and County of San Francisco, extending through to Stevenson Street, lying on the east side of and adjoining Central Park, and running east therefrom eighty-two and one-half (82½) feet by a depth of one hundred and sixty-five (165) feet, and that the land so agreed to be sold and conveyed to the said Edgar Mills included not only the said Market Street lot, but also all the land lying between the southeasterly line of said Market Street lot as described in said complaint and the center of said Stevenson Street, subject, however, to the easement of the right of way in the public over said Stevenson Street; that said defendants are informed and believe and therefore allege that said Stevenson Street

now is, and at all the times set out and referred to in the said complaint was, of a certain width, to wit, of the width of thirty-five (35) feet, and extended along and across the whole of the southeasterly end of the said Market Street lot.

Further answering the said complaint, said defendants deny that the said Market Street lot, or the land described and referred to in said contract of sale and purchase, was worth to the said plaintiff as of said seventh (7th) day of October, 1891, and thereafter down to the date of the alleged breach of the contract referred to in said complaint, or at any time in said complaint alleged or at any time, or at all, the sum of one hundred and sixty-five thousand dollars ($165.000.00) or any other sum whatever; and the said defendants deny further that the lands of said Edgar Mills, described and alleged in the said complaint or described or referred to in said alleged agreements, were, on said day or at any other time, of the value of one hundred and seventy-three thousand four hundred dollars ($173,400.00), or that they were on said day or at any time of any greater value than fifty-nine thousand and forty-five dollars ($59,045.00).

Further answering, said defendants allege that they are informed and believe and therefore allege that said Edgar Mills did not at any time alleged or referred to in said fourth amended complaint, or at any time whatever, own any land known as or called "Mills' land, or lands at Sites," or "Land, or lands at Sites," and allege further that they are informed and believe and therefore allege that the land particularly described in said fourth

amended complaint by legal subdivisions and referred to in said fourth amended complaint as "certain lands at Sites containing 3281½ acres," was never at any time known or called by any such name, or designated as aforesaid, or as "Lands at Sites," and that if the words in said alleged contract referred to the said land so described by legal subdivisions, it was the first time that the same or any part thereof was so designated, and said defendants allege that on said seventh (7th) day of October, 1891, the said Edgar Mills did own other lands at Sites in said complaint referred to, and allege that on said day and at all the times in said complaint referred to, to and including the time of his death, said Edgar Mills owned a certain tract or body of land containing thirty-two hundred and eighty-one and one-half (3281½) acres of land situate in said Colusa County, in sections twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33) and thirty-four (34), in township seventeen (17) North, Range four (4) west, Mount Diablo Base and Meridian, and that at and during all of said times there was a certain town or village called Sites, which was situated within one mile of the western line of said tract of land hereinabove lastly referred to, while said town is about two miles from the nearest point and points of said land which in said complaint is referred to by legal subdivisions as Mills' lands at Sites, and they therefore deny that the 3281½ acres at Sites referred to in said alleged agreement were the same lands as are in said complaint described by legal subdivisions and therein alleged to be the same lands.

Further answering, said defendants allege that they are informed and believe that said plaintiff was not, and they therefore on their information and belief deny, that at the time alleged, or at any time whatever, said plaintiff was able, ready and willing, or that he was able, or ready to sell and convey, or to sell, or convey, to said Edgar Mills said Market Street lot by a good and sufficient, or good, or sufficient, or any, deed conveying to the said Edgar Mills a perfect, or any, title to said lot, or that said plaintiff at the time alleged, or at any time, was able, or ready to convey the said lot, or any title thereto whatever to said Mills; and said defendants are informed and believe that the said Edgar Mills did not refuse, and they therefore deny that the said Edgar Mills on November 18, 1891, or at any other time whatever, refused to carry out his part of said alleged contract of sale and purchase either in whole or in part, or in any respect whatever, or that he refused to purchase the property so agreed by him to be purchased, or to accept a conveyance thereof made, or tendered under, or pursuant to, or in performance of, said alleged contract of sale and purchase, or that he refused to comply with, or to carry out his said alleged agreement to buy said lot as alleged, or at all; and said defendants are informed and believe, and therefore allege that heretofore, to wit, on the eighteenth (18th) day of November, in the year 1891, there was tendered to said Edgar Mills by one Joseph Donohoe, and in his own behalf only, a deed executed by said Donohoe and his wife conveying to said Mills the said Market Street lot, and that said

tender was made solely on the condition that said Mills should then and there pay to said Donohoe the sum of $165,000 cash, in gold coin of the United States, and should also assume and pay one-half of the taxes on said lot for the then current year; that neither the said deed, nor any other deed for said lot was ever at any time tendered to said Mills on any other condition, or for, or on behalf of any other person whatever; and they therefore deny that said Mills ever refused to accept a conveyance of said lot; and said defendants are informed and believe that the said plaintiff did not suffer any damages, and they, therefore, deny that by the acts and omissions, or either of them, of the said Edgar Mills, alleged in said complaint, or that by any act or omission of the said Edgar Mills, or at all, the said plaintiff suffered damages in the sum of one hundred and twenty-eight thousand four hundred dollars ($128,400.00), or in any other sum whatever, or at all.

Further answering, the said defendants allege that they are informed and believe, and they therefore allege that the said plaintiff on the said seventh day of October, in the year 1891, did not have, and that he never at any time whatever, either before or since said day, had any right, title, interest or estate whatever in or to, or possession of, the said Market Street lot or the land described and referred to in said contract of sale and purchase, or any part thereof, and that he never at any time whatever had any right or power to sell, or to convey, or to deliver the possession of, the same or any part thereof, or to make a contract to do so; and that neither the

said plaintiff, nor any one else for him, ever tendered to the said Edgar Mills, or to any one for him, a good and sufficient or any deed whatever of or for said lot, or the land described and referred to in said contract of sale and purchase, or any part thereof.

Further answering, the said defendants allege that they are informed and believe, and they therefore allege that on the said seventh (7th) day of October, in the year 1891, and at the time of the entering into of the mutual written agreements between said plaintiff and said Edgar Mills alleged and referred to in the said complaint and continuously thereafter and to and until a day subsequent to the death of the said Edgar Mills, to wit, the twenty-eighth (28th) day of September, in the year 1892, one Joseph A. Donohoe was the owner seized in fee of all of the said Market Street lot set out and described in the said complaint, except an estate in fee after the termination of an estate for the life of one Mary Penniman in an undivided one-twelfth ($\frac{1}{12}$) part of that part of said Market Street lot lying on the northeasterly side thereof and which said part is of a uniform width of thirteen (13) feet and nine (9) inches by one hundred and sixty-five (165) feet in length and fronting on said Market Street and running back to the said Stevenson Street, and that at and during all of said times prior to a certain day, to wit, the twentieth (20th) day of July, in the year 1892, the said estate in said undivided one-twelfth ($\frac{1}{12}$) was owned by one Robert Penniman and one Walter Penniman, on which said last mentioned day the estate of said Robert and Walter was conveyed to the said

Joseph A. Donohoe; that the remainder of the land described and referred to in said contract of sale and purchase, to wit, the part lying between the said southeasterly line of said Market Street lot and the center of said Stevenson Street, was during all of the times referred to or mentioned in said complaint owned in fee, subject to the easement of a right of way in the public as aforesaid, by some person or persons other than the said plaintiff, and who are and at all the times herein or in said complaint referred to have been unknown to these defendants or to any or to either of them.

For a further and separate answer said defendants allege that they are informed and believe and therefore aver that under and by virtue of the terms of the alleged contract set out and referred to in said fourth amended complaint, the said plaintiff herein was required to the said Edgar Mills an abstract of title to the land in San Francisco agreed to be sold and conveyed by said plaintiff to said Mills, that thereafter what purported to be an abstract of title to the said San Francisco land was supplied and handed to the said Edgar Mills and the said abstract was represented by the said plaintiff to the said Mills to be an abstract of the title to the said San Francisco land; that said defendants are advised, informed, and believe, and therefore aver that said abstract of title showed that said plaintiff had no right, title or interest whatever in or to the said land in San Francisco, but on the contrary, so far as said abstract showed at all, that one Joseph A. Donohoe was the owner, seized in fee of all of the said land in San Francisco set out and described

in the said contract of purchase, except that part of the said land which lies between the southeasterly line of the lot described in said complaint as the Market Street lot and the center of Stevenson Street, and except further that said abstract left open and subject to question as to whether or not an interest in said property was not still vested in some undisclosed devisees of a former owner thereof, to wit, one William Martin, who was then dead and administration upon whose estate was then pending and unclosed and in which there was nothing to establish who were the children of one Mary Penniman and who under the terms of the will of said William Martin were entitled to share in the said property as devisees; and said defendants are informed and believe, and therefore aver that upon further investigation it was found and the said Edgar Mills was informed and believed that an estate in fee, after the termination of an estate for the life of one Mary Penniman in an undivided one-twelfth ($\frac{1}{12}$) part of that part of said land in San Francisco lying on the northeasterly side thereof and which said part is and was of a uniform width of thirteen (13) feet and nine (9) inches by one hundred and sixty-five (165) feet in length and fronting on said Market Street and running back to said Stevenson Street, was then owned by one Robert Penniman and one Walter Penniman, and said defendants are informed and believe, and therefore aver the ownership of the said San Francisco land continued to be as hereinabove set out during all of the times referred to in said complaint prior to a certain day, to wit, the twentieth (20th) day of July, in the year 1892,

on which said day the estate of said Robert and Walter Penniman was granted and conveyed to the said Joseph A. Donohoe; and said defendants are informed and believe and therefore aver that upon the investigation as aforesaid of the title to the said San Francisco property and the disclosure of its condition as aforesaid it was agreed and conceded by all of the parties to and by all of the parties in any way interested in said contract of sale and purchase that the title to the said San Francisco property was not good and could not be granted or conveyed by the said plaintiff to the said Edgar Mills, and thereupon, to wit, on the twenty-seventh (27th) day of October, in the year 1891, the said contract of sale and purchase was abandoned and rescinded by the consent of all the parties thereto and that never at any time thereafter during the lifetime of the said Edgar Mills did the said plaintiff make any claim thereon or thereunder, upon or against the said Edgar Mills, or ask that the same be enforced or further carried out in any way or manner whatever, and that therefore the said plaintiff should not be heard to make or maintain any claim on or under the said contract, or be permitted to seek in any manner to enforce the same:

Wherefore, said defendants demand judgment against the said plaintiff that he take nothing and that they do have and recover of the said plaintiff their costs in this behalf incurred.

DENSON & DEHAVEN,
Attorneys for Defendants.

RICHD. BAYNE,
Of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

S. Prentiss Smith, being first duly sworn, deposes and says: That he is one of the defendants referred to in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

S. PRENTISS SMITH,

Subscribed and sworn to before me, this 23d day of November, in the year 1895.

(SEAL.) JAMES MASON,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed:] Answer to Fourth Amended Complaint.

Due service of copy of the within on us is hereby admitted this November 25th, 1895.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Plaintiff.

Filed November 25th, 1895, as of November 19th, 1895, by order of Court pursuant to stipulation of parties. W. J. Costigan, Clerk.

No. 11,878.

In the United States Circuit Court, Ninth Judicial District, Northern District of California.

ALBERT E. GRAY,
Plaintiff,
vs.
S. PRENTISS SMITH and others,
Executors, etc.,
Defendants.

Findings of Fact and Conclusions of Law.

From the evidence adduced upon the trial of this cause I find the following facts:

I.

On the 16th day of September, A. D. 1891, Edgar Mills, the decedent named in plaintiff's complaint herein and the testator under whose will the defendants are acting as executors, executed and delivered unto Albert E. Gray, the plaintiff herein, a document which was and is in the words and figures following:

"16 SEPT., 1891.

"To Albert E. Gray, Esq.,

"405 California Street, San Francisco.

"Dear Sir:—

"Provided you take the following described property, situate in Tehama and Colusa Counties, as part payment up to one hundred and fifteen thousand dollars ($115,000), I hereby make you an offer to purchase the lot

situate on the south side of Market Street in this city, extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one-half feet (82½ feet) by a depth of one hundred and sixty-five feet (165 feet), at the price of two hundred and forty thousand dollars ($240,000), namely:

In Cash	$125,000
And in land as above	115 000
	$240,000

This offer to hold good for three weeks from this date to enable you to inspect my said lands. Said lands described over page.

"Yours, etc.,

"EDGAR MILLS."

The following appears on back of above letter:

"IN COLUSA COUNTY.

My ranch near Colusa Junction, consisting of 2400 acres, known as Eureka Ranch, at $20.00	$ 48,000
Land at Sites consisting of 3281½ acres at $5.00	16,400

"IN TEHAMA COUNTY.

My ranch known as Ehorn Ranch, consisting of 1060 acres, at 30	31,800
Four hundred acres belonging to me close adjoining Kirkwood, at 20	8,000
And 1280 acres belonging to me a few miles west of Kirkwood, at 15	19,200
	$115,400

Say 8421 at $115,000.

"My agent, Mr. Houx, will show you the above lands and give you sectional descriptions.

"Yours, etc.,

"EDGAR MILLS."

II.

On the 6th day of October, A. D. 1891, the plaintiff executed and delivered unto the said Edgar Mills a document which was and is in the words and figures following, to wit:

"SAN FRANCISCO, October 6th, 1891.

"Edgar Mills, Esq.,

"Pacific Union Club, San Francisco.

"Dear Sir:—

"Referring to your letter to me of the 16th September, 1891, wherein you say: 'Provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars ($115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street, in this City, extending through to Stevenson Street, lying on the east side of and adjoining Central Park, and running east therefrom eighty-two and one-half feet (82½ feet) by a depth of one hundred and sixty-five feet (165 feet), at the price of two hundred and forty thousand dollars ($240,000), namely:

In Cash	$125,000
And in land as above	115,000
	$240,000

"'This offer to hold good for three weeks from this

date to enable you to inspect my said lands, thereinafter described,' I now and hereby accept your said offer in the said letter contained.

"I am, most respectfully,

"ALBERT E. GRAY."

III.

And on the 7th day of October, A. D. 1891, the said Edgar Mills and the plaintiff herein executed and delivered a certain document, which was and is in the words and figures following, to wit:

"SAN. FRANCISCO, Oct. 7th, 1891.

"Dear Sir:—

"I hereby accept the modification in the terms of your letter to me of the 16th September, 1891, now made by you, namely, that you pay,

In cash, one hundred and twenty thousand dollars.	$ 120,000
And in land (as specified in your said letter).....	115,000
	$235,000

"Yours respectfully,

"ALBERT E. GRAY.

"To Edgar Mills, Esq.,

"Union Pacific Club, San Francisco."

"I hereby confirm the above and direct you to forward abstract of title to me or my attorney herein.

"EDGAR MILLS."

The property referred to by the said several documents as situated on the south side of Market Street, etc., was and is properly described as follows:

"Commencing at a point on the southeasterly line of Market Street distant thereon 275 feet northeasterly from the point of intersection of the northeasterly line of Eighth Street, formerly Price Street, with the said southeasterly line of Market Street; running thence northeasterly along said last mentioned line 82 feet 6 inches; thence southeasterly parallel with Eighth Street 165 feet to the northwesterly line of Stevenson Street; thence southwesterly along said last named line 82 feet 6 inches, and thence northwesterly 165 feet to the place of beginning."

IV.

The title to said Market Street lot was from a date prior to the commencement of the negotiations between plaintiff and Edgar Mills until some time in the year 1892, vested in Jos. A. Donohoe, Sr.

On the 4th day of September, A. D. 1891, a paper writing was executed by one J. H. Cavanagh and Albert E. Gray, the plaintiff herein, which was and is in the words and figures following, to wit:

"SEPT. 4, 1891.

"To Albert E. Gray,

"Dear Sir:—

"With reference to the Market Street property between 7th and 8th Streets having a frontage of 87½ feet on Market, extending through to Stevenson Street in the rear, which I have for sale, being at present the property of Joseph Donohoe, it is understood and agreed between us that we divide equally between us the com-

mission payable on the sale thereof or the net excess between the selling price and the price your customer (or buyer introduced through your efforts) may give in cash or partly in cash and part in real estate exchange.

"J. H. CAVANAGH.
"ALBERT E. GRAY."

V.

On the 7th day of October, A. D. 1891, the plaintiff herein and the said Cavanagh executed a paper writing, which was and is in the words and figures following, to wit:

"SAN FRANCISCO, Oct. 7th, 1891.

"To J. H. Cavanagh,

"Dear Sir:—

"With reference to my contract with Mr. Edgar Mills wherein he agrees to purchase Mr. Donohoe's property on the south side of Market Street, having a frontage of eighty-two and a-half feet by one hundred and sixty-five feet between Seventh and Eighth Streets, as appears in his letter of contract of the sixteenth of September last, I hereby acknowledge that you hold an equal interest with myself in said contract. The lands mentioned in said contract to be granted and conveyed to us as tenants in common; and I hereby authorize you to act for us both in your negotiations with Mr. Donohoe. I have duly accepted Mr. Edgar Mills' letter of contract of the 16th ulto. as above.

"Yours truly,

"Approved: "ALBERT E. GRAY.

"J. H. CAVANAGH."

VI.

That on the 18th day of September, 1891, one J. H. Cavanagh made a written offer to said Donohoe for the purchase of said Market Street property, which written offer was in the words and figures following:

"SAN FRANCISCO, Septr. 18th, 1891.

"Joseph A. Donohoe, Esq.,

"San Francisco.

"Dear Sir:

"Regarding sale of your property, 82½x165 feet between 7th and 8th Streets, I hereby offer you firm $160,000.00 cash. I cannot wait for letter, and as I stated to you to-day must have answer by cable as I have only a limited time and wish to reiterate what I said to you to-day. This is a good price for the property simply because I can get you better property for less money. Please let me hear from you at your earliest convenience and much oblige,

"Very truly,

"J. H. CAVANAGH."

That said offer in writing was delivered by said Cavanagh to one Joseph A. Donohoe, Jr., who was the son and agent of Joseph A. Donohoe, Sr. That said Joseph A. Donohoe, Sr., was absent from the State of California. That said Joseph A. Donohoe, Jr., reported the fact of said offer to his father, who in writing signed by him authorized his said son to sell said land for one hundred and sixty-five thousand ($165,000) dollars and for one-half the taxes of the current year.

That said Donohoe, Jr., did not know anything of the resources or responsibility of the said Cavanagh, and therefore would not enter into a contract to sell to him or whereby Cavanagh might go upon the street and seek a purchaser, but demanded to know of said Cavanagh the name of the proposed purchaser, and was thereupon given the name of Edgar Mills. The said Donohoe, Jr., as agent of Donohoe, Sr., then executed a paper, which he placed in an envelope addressed to J. H. Cavanagh and delivered to him the document which was and is as follows:

"SAN FRANCISCO, October 7th, 1891.

"I hereby agree to sell my lot $82\frac{6}{12}$ feet on south side of Market Street, immediately east and adjoining the Central Park between 7th and 8th Streets and running through to Stevenson Street in the rear, to Edgar Mills for one hundred and sixty-five thousand dollars U. S. gold coin ($165,000), payable on delivery of deed after examination of title, say fifteen days from date. The purchaser to pay half of the taxes for the current year.

"JOS. A. DONOHOE, JR.,
"per J. A. DONOHOE, JR."

That the signatures to said instrument were intended for and meant Joseph A. Donohoe, Sr., per Joseph A. Donohoe, Jr.

On the 8th day of October, 1891, said Edgar Mills was first informed that the said Market Street lot in San Francisco belonged to the said Joseph A. Donohoe, Sr., and was at the same time informed of the execution by

said Joseph A. Donohoe, Sr., of the said written offer upon the part of said Donohoe, Sr., to sell to him, the said Edgar Mills, the said Market Street lot, and which offer was dated on October 7th, 1891, and is hereinabove set out in this finding in full.

VII.

On the 28th day of December, A. D. 1891, the said J. H. Cavanagh executed and delivered unto his wife, Amelia Cavanagh, a certain document, which was and is in the words and figures following, to wit:

"707½ Larkin Street, San Francisco.

"December 28, 1891.

"In consideration of the love and affection I bear my dear wife Amelia, I hereby assign to her the contract between myself and Joseph A. Donohoe dated October 7th, 1891, whereby he agrees to sell to my nominee, Mr. Edgar Mills, his lot $82\frac{6}{12}$ feet on south side of Market Street for $165,000 (a copy of which contract is hereunto annexed marked "A"), and all my right, title, interest, benefit, claim and demand therein or thereunder to hold unto my said wife, her heirs, executors, administrators and assigns, absolutely and for her own sole use and benefit.

"J. H. CAVANAGH.

"Witnesses to the signing hereof by said J. H. Cavanagh:

"MAX BLUM, 709 Larkin Street.

"JOE A. PATTERSON, 707½ Larkin St., San Francisco."

VIII.

And on the 4th day of September, A. D. 1893, the said Amelia Cavanagh executed and delivered to the plaintiff herein a certain instrument in writing, of which the following is a true copy, to wit:

"I, Amelia Cavanagh, formerly the wife and now the widow of J. H. Cavanagh, deceased, formerly of San Francisco, do hereby for value received assign, transfer and set over to Albert E. Gray, of Lasata Ranch, near Oroville, all my interest, claim and demand against the estate of Edgar Mills, deceased, for damages for breach of contract by said Edgar Mills, deceased, dated October 7th, 1891, for the purchase of the lot formerly owned by Joseph A. Donohoe on Market Street near Central Park.

"In witness whereof, I have hereunto set my hand and seal this 4th day of September, 1893.

"A. CAVANAGH (Seal).

"Signed, sealed and delivered by the above named Amelia Cavanagh in the presence of J. Whiteside, driver for Wilson's Stable, Raymond."

IX.

That said Edgar Mills never accepted the proposition contained in the said document executed by Joseph A. Donohoe, Sr., under date of October 7th, 1891, and neither said Mills nor said Cavanagh, nor said Gray ever complied or offered to comply with the terms of said offer. The plaintiff had no right, title or interest of, in or

to the said Market Street lot, save such as he may have gained by or through the several documents hereinbefore in these findings set out by copy, and no contract existed between plaintiff and defendants' testator for the purchase of said Market Street lot or otherwise, except as contained in the foregoing several documents set out in findings I, II and III.

X.

The lands mentioned in the said letter from Edgar Mills to plaintiff dated September 16th, 1891, and set out in finding number I herein, are the same as the lands in Colusa and Tehama Counties, State of California, described in the second paragraph of the fourth amended complaint herein.

XI.

Plaintiff never paid or offered to pay to said Joseph A. Donohoe, Sr., the purchase price demanded by the said Donohoe for the said Market Street lot, and did not at any time have the means or ability to pay the said Donohoe the purchase price demanded by him for the said Market Street lot, and plaintiff never took any steps to procure for the said Edgar Mills the title to the said Market Street lot other than by procuring the written offer of said Donohoe dated October 7th, 1891, which offer is fully set out in finding number VI.

On the 23d day of November, A. D. 1891, the said Jos. A. Donohoe, Sr., executed three several deeds of said Market Street lot, one to Edgar Mills, one to J. H. Cavanagh and one to the plaintiff Albert E. Gray, and

tendered the same to the said several grantees respectively, and demanded of each of them the payment of the said sum of $165,000.00 in gold coin, and one-half of the current year's taxes, and each of said grantees refused to accept such deed or to pay the said purchase price demanded. The said deeds were tendered and said price demanded by said Jos. A. Donohoe, Sr., under the advice of his counsel, for the sole purpose of cutting off and determining any supposed or possible right on behalf of said Mills, Cavanagh and Gray, or either or any of them, in or to said Market Street lot growing out of the written offer made by him under date of October 7th, 1891, and set out by copy in finding No. VI above, and to free his said Market Street lot from any equities on the part of any of said persons, and so that he might sell said lot with an unquestioned title to another purchaser.

XII.

That after the execution by the said Joseph A. Donohoe, Sr., of said document of October 7th, 1891, the said Donohoe delivered an abstract of title of said Market Street lot to the attorneys of the said Mills, Messrs. Jarboe and Jarboe, who after examination thereof, on October 23d, 1891, wrote, signed and delivered to said Mills the following letter:

"San Francisco, October 23d, 1891.

"Edgar Mills, Esq.,

"Dear Sir:—

"As soon as we had completed the examination of

that part of the abstract furnished us for the Market Street purchase, we sent it to our searcher for continuation, with a special reference to certain defects that were disclosed by the original abstract.

"The defects disclosed by the abstract, as Mr. Paul Jarboe explained to you, are as follows:

"The title comes through two different deraignments, one including the westerly sixty-eight feet and nine inches, and the other the easterly thirteen feet and nine inches.

"The title to the sixty-eight feet and nine inches seemed to us to be good on the original examination; but the title to the thirteen feet and nine inches seemed to be bad for this reason: a deed was made to a woman named Margaret Martin in the lifetime of her husband, purporting to convey the property to her; but, from the manner in which the deed was drawn, it gave the title presumptively to her husband instead of to herself, and made it necessary to get a deed either from her husband or through his estate.

"A probate proceeding was commenced on the estate of William Martin, which, if it had been carried out, would probably have revoked the defect; but that estate is still pending in the Probate Court and undisposed of and undistributed.

"Mr. Hyde, or other grantors of Mr. Donohoe, seem to have found this difficulty out themselves, and have gotten in deeds from a number of persons claiming to be heirs of William Martin, but, as the Probate record is silent on this subject, there is no evidence as to who

were the heirs of William Martin, whether they were adults or minors, whether the creditors have been paid, or whether all the heirs have united in the deeds.

"We called the attention of Mr. Donohoe, Jr., to this matter on Tuesday, and asked him to look among his papers and see if he could find any opinion of his attorney on the subject, or any documents throwing light on the subject.

"On the same day he returned, giving us merely one deed. He, himself, knew nothing of the difficulty, but seems to think the title was reported to his father as perfect.

"He, however, referred us to Mr. Galpin, who is now doing business for his father.

"We saw Mr. Galpin this morning and explained to him the difficulty and he has taken the abstract and promised to see us again during the day upon the subject.

"Of course, having reported a defective title, under the rule of law we have complied with your obligation as to the fifteen days, and time does not run against you now until the vendor is able to remove our objections and our report was made to Mr. Donohoe long within the necessary time.

"Under the law as it now stands, the wife has to join in a conveyance of the community property of her husband.

"Mr. Donohoe, Jr., has a power of attorney from his father, but none from his mother. If the sale goes through, the parties will have to sign the deeds themselves.

"Mr. Donohoe suggested, the other day, that a deed should be prepared and sent to New York for execution, but we have not seen fit to follow this course, because we do not wish to be deemed to admit that the title is a good one.

"As soon as Mr. Galpin reports to us we will make a further report to you, and hope that that will be during the course of the afternoon.

"Your rights are in no way prejudiced, as above written, on account of the fact that we have reported on the title within time.

"Yours very truly,

"JARBOE & JARBOE."

On the 27th day of October, in the year 1891, Jarboe & Jarboe wrote, signed and delivered to said Mills the following letter:

"SAN FRANCISCO, Oct. 27, 1891.

"Edgar Mills, Esq.

"Dear Sir:—

"We have just seen Mr. Galpin, to whom we were referred by Mr. Donohoe, in regard to the piece of property on Market Street.

"They admit that our objection is well taken, and suggest a plan for straightening the title which will take at the shortest 60 days. It will probably be somewhat longer than this, however.

"They are willing to adopt any methods of correction which we may submit to them, but the defects are such that it will hardly be possible to cure them in much shorter time than 60 days.

"Waiting to hear your wishes upon the subject before proceeding further with the matter, we are

"Very respectfully yours,

"JARBOE & JARBOE."

Subsequently and prior to November 18th, 1891, the said Jarboe & Jarboe rejected the title to the Market Street lot and reported to said Mills that said title was fatally defective, and thereupon the attorneys of said Mills reported to Mr. Gray, the plaintiff, as follows: That they had reported to him, Mills, a fatal defect in the title, in consequence of which said Mills had definitely decided not to "assume" the purchase, and had given notice to said Donohoe, Sr., to that effect, whereupon plaintiff expressed his surprise and said he would see Mr. Donohoe, Sr., about the matter. The said title was not in reality defective, and the said Donohoe had a good, marketable, sufficient and clear title, deducible of record, to said Market Street lot, although at the time when the said Mills objected to such title said Donohoe and his attorneys conceded that the objections thereto made by the attorneys for said Mills were valid, and that said title was in fact defective.

XIII.

The plaintiff herein has not suffered loss or damage through or by any act or omission of the said Edgar Mills as alleged in plaintiff's fourth amended complaint herein or otherwise, in the sum of one hundred and twenty-eight thousand four hundred ($128,400) dollars, or in any sum whatever.

XIV.

It is not true that on the 27th day of October, A. D. 1891, or at any other time, the contract of sale and purchase made between plaintiff and the said Edgar Mills was abandoned or rescinded by the consent of all the parties thereto.

And as conclusions of law from the foregoing facts the Court decides:

1st. That said plaintiff was never at any time able or ready to convey, or cause to be conveyed, to the said Edgar Mills the said Market Street lot according to the terms of the contract set out in the complaint.

2nd. That the plaintiff has suffered no damage, and is not entitled to any relief in this case.

3rd. That the defendants are entitled to judgment for costs.

Let judgment be so entered.

JOSEPH McKENNA,
Judge.

[Endorsed:] Filed September 16th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California, Ninth Circuit.

ALBERT E. GRAY,
Plaintiff,
vs.
S. PRENTISS SMITH, FRANK MILLER and WILLIAM P. HARRINGTON, Executors of the last Will and Testament of Edgar Mills, Deceased,
Defendants.

Bill of Exceptions.

Be it remembered that on the 16th day of September, 1896, the Court rendered its decision in the above entitled action in the words and figures following:

(Here follows true copy of findings.)

Evidence, both oral and documentary, was introduced by and on behalf of the respective parties to the said action upon the issues raised by the pleadings therein, and, among others, the following:

WILLIAM MINTO was a witness called and sworn on behalf of the plaintiff, and testified that his business was that of a surveyor—civil engineer; that it was such in the year 1891; that he was employed a greater part of the time in reporting on land values; that he so reported for the Savings Union and State University, and for in-

dividuals; that he had been in that business about ten (10) years; that in the fall of 1891 he visited, for the purpose of appraising and making a report thereon, the lands referred to and described in the complaint in said action; that he took with him a Mr. Houx, who was farming a part of Mr. Mills' lands in the same neighborhood; that he examined the said lands and appraised the values of the same, and stated his valuation of the particular tracts, and also testified that he made the said examination and appraisement by the instructions or orders of the Savings Union.

Jos. A. Donohoe, Jr., was also a witness who was called and testified on behalf of the said plaintiff (among other) as follows: testified that the reason why he, witness, made the memorandum of date October 7th, 1891, executed by him on behalf of his father offering to sell the property referred to in the complaint as the Market Street lot, for $165,000 and half the taxes, run on its face in favor of Edgar Mills, although Cavanagh had made the offer to buy the said property, was that he, witness, did not know Cavanagh; did not know anything about him, or anything about his resources, and that he, witness, would not have given him, Cavanagh, that piece of land for sale at that time, and give Cavanagh a line on it, and have him take it out on the street; that he, witness, preferred to be the judge of who was buying it, and insert that name in; that in other words, it was a sale to Edgar Mills, or nobody; that he, witness, asked him, Cavanagh, for the name of the purchaser which he, witness, inserted in that agreement purposely; that as he,

witness, said before, he would not have given Mr. Cavanagh a line on that lot without having some reservation of that kind; that after he, Cavanagh, told witness Mr. Mills, witness made some remark that he, Mills, was a very old friend of his father, and that after some further conversation Cavanagh said: "I am not dealing with Mr. Mills; it is a friend of mine;" that witness asked him who it was, and he said a Mr. Gray, and he offered to bring him in and introduce him; that witness thought one broker was enough at the time, and asked Cavanagh to produce some authority or some agreement between Mr. Mills and Gray, to show that they were working in conjunction; and that Cavanagh went out and brought in some letter, the contents of which witness did not remember.

Further, that witness was not informed by Cavanagh that Mills was buying this property (the Market Street lot) from Mr. Gray, so far as he could recall; that Cavanagh made witness a written offer, which witness submitted to his father and got his confirmation or authority to sell for a certain price by cable; that witness told Cavanagh that he would not sell to him, and when Cavanagh asked for a written agreement witness asked him the name of his principal, and he said Edgar Mills, and then witness put it in that paper; that witness only handed him, Cavanagh, that paper (to wit, the memorandum of October 7th) after Cavanagh assured witness by some writing that he was working in conjunction with Mr. Gray.

Oliver Ellsworth was also called and was sworn,

and testified on behalf of said plaintiff (among other) as follows: That on the 24th day of November, in the year 1891, he tendered to the said Cavanagh and to the said plaintiff respectively, deeds executed to them severally by the said Donohoe, Sr., and his wife, and conveying said Market Street lot, and demanded of the said grantees in the said respective deeds the payment of the consideration therein set out, to wit, $165,000; and that each of said respective grantees refused to pay the said consideration, and that in consequence neither of said deeds was ever delivered to either of said grantees.

The said several tenders of said respective deeds was shown by the evidence to have been made by the said Ellsworth on behalf of and under authority from the said Jos. A. Donohoe, Sr., and not otherwise.

There was no other evidence upon the issue as to the ability of plaintiff to pay Jos. A. Donohoe, Sr., for his Market Street lot.

In the printed argument signed and presented herein by the attorneys for the plaintiff on his behalf, among other, are the following paragraphs: * * * "Upon this payment and conveyance by Mills to Gray depended Gray's ability to produce Donohoe's deed, depended so utterly and wholly that Mills' refusal to go amounted to an absolute prevention of Gray's performance. Every fact in the case points to the moral conviction that if Mills had lived up to his contract by paying his $120,000.00 and conveying to Gray the country lands, Gray would have been abundantly able to carry out his part of the compact. Herein lay Gray's ability: in the anxious

readiness of Donohoe to live up to his engagement, in the fact that Mills' land and money, which under the contract belonged equitably and potentially to Gray, would have enabled him to pay Donohoe and procure the deed. * * * Morally, we know that if Mills had not retired the transaction would have gone smoothly through, and that Mills' conduct was the sole cause of its defeat. Morally, we know that Gray could not fulfill his engagement unless Mills on his part fulfilled the obligations arising from his acceptance of the benefits of the transaction and his knowledge of the facts."

There was no evidence whatever that plaintiff could have procured a loan for any amount whatever, even had he owned Mills' country lands, or had the same been conveyed to him.

There was no evidence whatever that plaintiff had any financial ability, or that it would have been possible for him to have raised an amount sufficient to pay the price asked by Donohoe for the Market Street lot, or that he had completed any arrangement to procure a loan for any amount whatever upon the lands which, under the contract alleged in the complaint, Mills was to convey to him in exchange for the Market Street lot.

THE PLAINTIFF NOW EXCEPTS to the decision of the Court that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market Street lot, and as grounds of said exception states that said finding was not supported by the evidence.

And because the foregoing does not appear of record, the plaintiff has in due time prepared and served on defendant this his bill of exceptions, and asks that the same may be settled and allowed by the Court.

The foregoing bill of exceptions is allowed.

Dated October 30th, 1896.

JOSEPH McKENNA, Judge.

[Endorsed:] Filed October 30th, 1896. W. J. Costigan, Clerk.

Petition for Writ of Error, filed February 12, 1897.

Assignment of Errors, filed February 12, 1897.

Order allowing Writ of Error, filed February 12, 1897.

Bond approved, filed February 12, 1897.

Certificate to Transcript, certified March 9, 1897.

Writ of Error and Answer thereto, filed February 12, 1897.

Citation, filed February 12, 1897.

No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the Last Will and Testament of Edgar Mills, Deceased,
Defendants in Error.

Brief on Behalf of Plaintiff in Error.

SYDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

Writ of Error to the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

Filed ..... *1897.*

.....
Clerk.

DEMPSTER BROS LAW PUBLISHERS BOND & GLEN PARK S F

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY, *Plaintiff*, vs. S. PRENTISS SMITH, FRANK MILLER and WILLIAM P. HARRINGTON, Executors of the Last Will and Testament of Edgar Mills, Deceased, *Defendants.*	No. 11,878.

Brief on Behalf of Plaintiff in Error.

Vendor and Purchaser — Action for Damages for Breach of Contract by Purchaser of Real Estate—Ready, Able and Willing—When a Necessary Plea—Burden of Proof.

Statement of the Case.

On October 7th, 1891, Mills, the defendants' testator, and Gray, the plaintiff, agreed in writing that Mills should buy from Gray a lot on Market street in San Francisco for $235,000, and that Mills should pay therefor $120,000 in cash, and the balance by a conveyance by Mills to Gray of lands in Colusa and Tehama Counties valued by Mills at $115,000.

During the negotiations with Mills, Gray had not then yet acquired title to the Market street lot, which was the property of one Joseph Donohoe. Before closing with

Mills, however, Gray (through one Cavanagh) obtained an agreement from Donohoe for the purchase of the lot at $165,000, showing a profit to Gray, therefore, of $70,000, namely, the difference between $165,000 and $235,000, as above. This agreement was taken as running to Mills direct, as Cavanagh's nominee. Prior to delivery and acceptance of abstract, Mills was made aware of all the circumstances attending the sale, including the fact that the legal estate was still in Donohoe, and that a profit of $70,000 was coming to Gray out of the transaction. A copy of the Donohoe document accompanied the abstract, thus bringing the abstract of title down and complete to that date.

See the letter from Mills' attorneys, Jarboe & Jarboe, wherein they refer to this document. See also Jarboe's testimony. (Transcript, pages 34, 38.)

Mills accepted the abstract and submitted it to his attorneys. At no time prior to action did Mills or his attorneys make any complaint, or suggestion even, of *mala fides* on Gray's part, or that there was any doubt whatever of his not being "ready, able or willing," at the proper time, to give effect to and to carry out his agreement.

After a lapse of some time, however, Mills' attorneys made an objection on an alleged specific defect in title, and subsequently gave notice to plaintiff, on behalf of their client, that this defect in title was fatal and that Mills unqualifiedly refused to proceed with the purchase. This was the "breach," and the *only* reason given therefor.

In the Court below the title was proved to be good; the objection to title raised by Mills' attorney was declared to be not well taken, and the breach and renunciation of the contract by Mills was held to be without excuse. This, then, practically was the whole point in contention, and decided in favor of plaintiff. The Court, however, held that the plaintiff must lose, notwithstanding this finding, because he failed to show that he had the ability to perform, or, as the Court expressed it, the "independent ability" to perform, apart from any benefit to be derived on completion through the purchase money and land exchange coming to him from Mills on completion.

We contend that the plaintiff not only won on the merits, but that the Court erred in ruling that the plaintiff must show "independent ability," or indeed (time of performance not being due at the date of breach) any ability whatever. We propose to show that a "breach of contract by one party *before* time of performance is due" not only absolves the other party from making tender or offer of performance (as in the case in a breach *after* time for performance), but waives performance itself and the necessity of averring and proving the ability to perform.

Thus, then, the decision of the Court below was based upon one proposition only: that the evidence failed to show that Gray was ever able or ready to convey to Mills the Market street lot. To this question, therefore, this brief will be particularly addressed; but we shall, nevertheless, feel constrained to notice some of the positions which were taken below by counsel for the defendants.

Specification of Errors.

Plaintiff has specified in his assignment of errors accompanying his petition for writ of error three errors which he complains of, which are as follows:

1. The Court erred in deciding that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market street lot.

2. The Court erred in giving judgment against the plaintiff and for the defendants for their costs, because Edgar Mills, having refused to take the title of the said Market street lot, and having given notice to plaintiff that because of such alleged defect in title he refused to carry out his contract for the purchase from the plaintiff of said Market street lot, became and was liable to the plaintiff for such breach of his contract without regard to plaintiff's ability to pay said Donohoe the purchase price demanded by him for said Market street lot.

3. The Court erred in giving judgment against the plaintiff and for defendants for their costs.

Brief of the Argument.

The plaintiff contends that there are three separate and distinct classes of "breach of contract," namely :

(*a*) A breach that is *forced* on one contracting party by the other.

(*b*) A breach by default that one party to the contract voluntarily incurs *after* time of performance has arrived.

(*c*) A breach by default that one party to a contract voluntarily incurs *before* time for performance has arrived.

Plaintiff further contends that in an action for damages for a breach of contract the question as to whether or no a plaintiff must prove his "ability to perform" is governed entirely by the further question : under which class (*a*, *b*, or *c*) does the breach fall ? And plaintiff further contends that case at bar falls under class *c*, and that he is under no obligation to prove that he was ready, able and willing to complete at the date of the breach, or that he could, but for the breach, have been ready, able and willing to perform his part of the agreement at some future day not then due for performance.

Although plaintiff contends that he is under no obligation to prove "ability," by reason of defendant's renunciation of contract *prior* to time for performance, yet as the question of plaintiff's "ability" was one of the main points of attack in the Court below it seems expedient to refer to it here. We propose to show therefore :

1. That if it could be shown that plaintiff's case came within the class of breach that called for proof of ability, then that he, in such a case, *did prove* his "ability" in the Court below to the same extent and in the like manner as in the several parallel cases reviewed below.

We next propose to show :

2. That under the facts of this case plaintiff is under no obligation to prove ability, and that if the question of ability be raised at all it must be raised by the defendant in his answer and amount to an allegation of fraud or *mala fides*.

I.

Gray's Ability to Perform.

The facts upon which this question arises may be thus briefly stated. Prior to the date of the written agreement between Gray and Mills, Cavanagh, who was interested with Gray in the transaction, had offered to Joseph A. Donohoe, the owner of the Market street lot, $160,000 for it. Donohoe declined to give an "option" on the property to Cavanagh, a stranger, but consented to accept Mills as Cavanagh's nominee, and executed, on October 7th, 1891, an instrument in writing agreeing to sell the lot to Mills for $165,000. Mills was duly informed of all the facts above detailed. Subsequently the abstract of title was delivered to Mills, was accepted by him and submitted to his attorneys. After some time and prior to November 18th, 1891, Mill's attorneys rejected the title, reported their rejection to Mills, and informed Gray that Mills had accordingly decided not to buy the lot.

Gray accepted this notice as conclusive, and in due time brought his action for damages occasioned by the breach.

The objection to the title was not properly taken, as it was "a good, marketable, sufficient and clear title deducible of record." (Findings, page 42, Transcript.) Upon the rejection of his title, Donohoe, on his own behalf only, tendered a deed to Mills and demanded payment, but Mills refused to accept the deed. A similar tender was made by Donohoe to Gray and also to Cavanagh.

Upon this state of facts it is evident that the responsibility for the failure of the transaction rested with Mills. If he had accepted the title as he should have done, Gray could, *without reference to his own or to Cavanagh's resources outside of the transaction itself*, have borrowed $45,000 upon the $115,000 worth of country land which he was to receive from Mills, and with the $120,000 to be paid him by Mills could have paid for and obtained Donohoe's deed to Mills, thus satisfying the contract. But the Court below was of the opinion that, as a basis for a recov-

ery, there should have existed in Gray an ability to perform quite independent of any resources which were to come to him from Mills, and that it was incumbent upon him, by positive proof, to establish the existence of such an ability in himself. In opposition to this view we shall contend that, even if it were necessary for the plaintiff to affirmatively establish an ability on his part to perform, such ability need not be independent of the transaction, but was sufficiently furnished by the circumstances of the transaction itself and existed potentially in the fact that the cash and property coming from Mills were more than sufficient to satisfy Donohoe and enable Gray to fulfill his obligation. And, further, upon a wider view, and with reference to broader principles of law applicable to the relations of the parties growing out of the facts, we shall contend that the conduct of Mills dispensed entirely with any necessity on Gray's part to have or to show any ability of performance whatever at the time of the breach of the contract by Mills or subsequently thereto.

The Doctrine of "Independent Ability."

That the ability to perform need not exist in either party at the time of entering into a contract is established by abundant authority. It is sufficient if the ability exists at the time of performance. As to contracts for the sale and purchase of land, it has been repeatedly held that the vendor need not have the title at the time of making the contract. As was said by the Supreme Court of California in Easton vs. Montgomery, 90 Cal., 315: "It is not necessary that the vendor should be the absolute owner of the property at the time he enters into an agreement of sale. An equitable title in land, or a right to become the owner of land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, *either by the voluntary act of the parties holding the title*, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof."

And see Burke vs. Davies, 85 Cal., 114.
Anderson vs. Strassburger, 92 Cal., 40.
Joyce vs. Shafer, 97 Cal., 338.
Trask vs. Vinson, 20 Pick., 111.
Mitchell vs. Atten, 69 Tex., 70.
Pomeroy's Specific Performance, Secs. 341, 342.

Defendants have endeavored to make much of the circumstance that Gray obtained the contract from Donohoe as not running to himself, but as running to Mills direct. We fail to see how this affects the question one way or the other. Whatever Gray's equities and rights under that document, the fact that Donohoe agreed to convey to Mills at *Gray's request* surely was no barrier to Gray's fulfilling his obligation. (We may say parenthetically that we frequently omit mention of Cavanagh's name for the sake of brevity and to avoid confusion and unnecessary detail—Gray acquired Cavanagh's right by assignment, as is duly shown in the transcript, pages 31, 32.)

It must be remembered that at the date of the Donohoe agreement negotiations were not only in progress between Mills and Gray for the purchase of this property from Gray, but had so far progressed that Mills at that time had actually made Gray an open offer for a definite period not then due—an offer that only required Gray's acceptance to make a complete and binding contract. Mills surely then can have no reason to complain, or to assert that he was in any way hurt, or his rights or position in any way jeopardized or affected by Gray's obtaining a contract from Donohoe as running to Mills himself of land that was then the subject of his offer, and that it was Gray's intention then and there to convey or procure Donohoe to convey to Mills himself. The cases are clear that if Gray had obtained a contract from Donohoe running to a *stranger*, or if he had obtained a mere verbal agreement, not enforcible under the statute of frauds, or, indeed, if he held no agreement whatever, it would be sufficient, if at the time fixed for the performance he could procure the signature of the owner to a good and proper conveyance of the property to the purchaser.

For the purposes of the argument, therefore, of the point we are now discussing, we shall assume that the arrangement between Donohoe and Cavanagh, which resulted in the agreement to convey to Mills, as Cavanagh's nominee, was the equivalent of a contract in favor of Gray and gave Gray the right and power to produce a deed running to Mills in fulfillment of his contract. Viewed in this way, which is in accordance with the substance of the transaction rather than of its form, Gray was the equitable owner of the Market street lot, subject to an obligation to pay its purchase price, which was thus in the nature of an encumbrance to be removed by Gray before he could procure a deed and convey a good title to Mills. This encumbrance differed in no way from any other lien or charge upon the land of a vendor. And yet it has been held that in the case of a contract to convey land free from encumbrances, if the consideration money exceeds the amount of the encumbrances on the land, the vendor, in suing for a breach, need not prove that without the purchase price he had an independent ability to pay off the encumbrances.

In such a case it is quite sufficient for him to show that the purchase price would have cleared the land of its liens.

Rhorer vs. Bila, 83 Cal., 51.
Irvin vs. Bleakley, 67 Pa. St., 29.

The vendor of land encumbered by a mortgage presently payable fulfills his obligations under the contract of sale if he tenders his deed, at the same time offering to obtain a release with the purchase price, and no Court would permit the vendee to evade his contract where the purchase price was more than sufficient to pay off the mortgage and the vendor offered to make such payment contemporaneously with the payment of the price and delivery of the deed.

Webster vs. Kings County Trust Co., 80 Hun., 420.

There can be no difference in this respect between a sum necessary to pay off an incumbrance and a sum necessary to obtain the title from the owner, and if in the latter case the vendor tenders his own deed, at the same time offering to apply the purchase money to the payment of the owner

and the procuring of the title, the vendee can raise no objection, especially if he has known throughout the transaction that this was to be the course of the business, and has made no protest.

This was probably the position taken by the Court below as to the $120,000 payable by Mills to Gray. If that sum had been sufficient to obtain Donohoe's deed, we think the Court would have had no difficulty in finding an ability in Gray to perform. It is only as to the excess of $45,000 that the Court was unable to find any ability of payment in Gray.

But if the principle be once admitted, and we see no escape from it, that the ability to perform need not always reside in each party, independently of the other, or independently of the transaction itself, and that it may be drawn from the consideration which is to be paid by one party to the other, it would seem unreasonable to confine the principle to those cases only where the consideration which is to enable one party to perform is a money payment, and to refuse to apply it to those cases where the consideration is property having a money value and an equal capacity with money to furnish ability of performance.

In this case land valued at $115,000 was, as a part of the transaction, to be conveyed to Gray. Why should the Court have shut its eyes to the obvious fact that with this land Gray could readily have obtained the excess wherewith to pay Donohoe? Why should the judicial mind refuse to recognize a conclusion so clearly and irresistibly to be deduced from all the evidence?

We maintain with confidence, and will presently show, that it does not rest with us to prove that Gray had the financial ability to perform, but if it did, we contend that a sufficient ability in Gray to perform his part of the contract grew out of the very facts of the transaction, and was proved to a moral certainty by the evidence. This we claim is the only practical, business-like view which can be taken of the matter. We *know* that Gray was able to perform, because we know that the consideration to be paid by Mills would

have given him that ability, if he did not already possess independent ability of his own.

There was no purchase money payable by Gray to Mills, or to be tendered, therefore, under any circumstances or at any time by Gray to Mills, and his ability to clear the Donohoe title of the "equitable mortgage" (or "incumbrance" of .$165,000 or $45,000, as the case may be) was at least shown in the same way, and *to the same extent* as in Carpenter vs. Holcomb, 105 Mass., 285; Smith vs. Lewis, 24 Conn., 624; Howland vs. Leach, 11 Pick., 155, and numerous other cases that might be quoted did necessity demand.

If Gray had proved at the trial that he was possessed of his *own* "independent" property to the value of $115,000, would it have been necessary for him further to prove that he had actually raised the $45,000 thereon, and have put it in his pocket or his bank before bringing suit? Unquestionably the principle would have been allowed, as in the cases above mentioned, that in showing that he had property valued at $115,000, whereon he could raise $45,000, he had shown sufficient presumptive evidence of his ability to "*procure a release*," and that there was no necessity to disturb his investments, to encumber his estate or to do any other act for the mere purpose of performing a "useless ceremony" or preparing for actual performance after notice from defendant that he would not perform. Wherein lies the difference, in effect or in essence, between a vendor who has *property of his own* whereon he could raise sufficient money to clear incumbrances, and *excess of property coming to him on completion* whereon he could raise the same money and give a clear title on completion?

That an independent ability need not reside in each party to a contract is manifest in the class of cases where the means of performance are almost necessarily furnished by one party to the other. In large manufacturing contracts, or contracts for the performance of work, where one party agrees to pay in installments as the manufactured product is delivered, or as the work progresses, the ability of the manufacturer to produce, or of the contractor to go on with the work, nearly always depends upon the payments to be

made during the performance of the contract. Would it be a good defense to a suit by a manufacturer, or a contractor, that he had no ability to perform independent of the means which were to be furnished him by the defendant?

There is another answer to be given to the special reason inducing the decision of the lower Court in this action. Equitably, the country lands belonged to Gray, subject only to his obligation to pay for them. Mills was his trustee. They were part of Gray's assets and estate, and as such, of themselves, vested in him an actual ability to pay for and procure Donohoe's title.

And it is further to be considered that, even when ability of performance must be shown, the term does not necessarily imply actual and completed preparation, but rather the possibility of getting ready within the proper time and under the proper circumstances. *Readiness includes ability, but ability does not include readiness.* And while a man must, in some cases, show that he was able, it does not follow that he must show that he was ready.

This was made very clear in Smith vs. Lewis, 24 Conn., 624, where this language was used by the Court:

"It is not claimed that a tender of performance is necessary to entitle the plaintiff to a recovery; that was physically impracticable. But it is justly said that the proof will show that the plaintiff was 'ready and willing' to perform; and the disposition and ability being proved, the only remaining objection relates to the degree of preparation. The plaintiff had not his money in his formal possession; he had not cleared his own estate of incumbrances, and had not prepared the title deeds of his property; all these preparations he had suspended in view of his arrangement to meet the defendant, *at which he expected some facilities to be furnished by the defendant*, not necessary but convenient to himself; but all which preparations he was able to complete, and would have completed if the defendant had not by his absence, under the peculiar circumstances of the case, induced him to desist. By yielding to this inducement, it is said, he has defeated his own right to a recovery. The argument is that, although the plaintiff was naturally

and rightfully convinced by the unexplained and evidently contrived absence of the other contracting party, that the latter was determined to break the contract, and was thereby dissuaded from the nugatory and superfluous acts of taking his money into his manual possession, of procuring the release of mortgages and actually drafting and acquiring conveyance of his own real estate, he thereby fell short of his duty ; that *there is a legal and arbitrary standard of readiness*, which is not to be affected by the absence of the other party ; that the legal effect of absence is limited to the mere excuse of the tender of performance ; that in cases like the present the act of a party will not, *as his declaration would*, justify the other in attaching to it an ordinary and natural import ; that the act of absence, no matter what its attendant circumstances or how clearly it reveals a fraudulent intent to violate a contract, has a limited and arbitrary legal effect ; and that a party who by such conduct actually causes another, not unreasonably, *to suspend the further performance of his contract can take advantage of his own wrong* and set up the defect of performance as a breach of legal duty ; that the party claiming to be excused must show that he is excused by the law, and not by the other contracting party ; as if there were any legal duty under a contract, which the parties may not dispense with by their own voluntary acts.

" Notwithstanding some confusion in the decisions, arising from the endeavor of Courts to apply, in this class of controversies, the principles of common reason and justice to the particular case, we have been unable to find that any such legal and arbitrary standard of readiness exists as is thus suggested, or that there is any prescribed legal effect to the willful absence of a contracting party from the place of performance, or that the extent of the necessary preparation may not vary with circumstances and the attitude of the other party, or that a refusal will only excuse from such covenant duties as it may render impossible to perform. On the contrary, we think it to be a demand of *justice that a willful refusal*, with which a willful absence is conceded to be identical, will excuse the performance of

all acts, including formal acts of preparation, of which the refusal fairly imports a renunciation and disavows the acceptance ; in other words, of all acts, of the failure to do which the premeditated conduct of the other party is, in a just and reasonable sense, the direct and undeniable cause."

In Carpenter vs. Holcomb, 105 Mass., 285, a similar state of facts was treated in the same way.

"The defendant insists that the plaintiff fails to show a readiness to perform, at the time of her offer, because the mortgage was not discharged. But readiness, within the meaning of the rule, does not require full and complete preparation at the moment when the offer is made. It is not necessary that the plaintiff should come with the deed and discharge of the mortgage duly signed, sealed, stamped and ready for delivery, and with release of dower, when the contract requires such release. It is enough, where there is an *unqualified refusal* of the defendant shown, if the plaintiff has the *ability to procure* a discharge and give a good title. There was evidence here, taken in connection with the known and usual mode of transacting such business, *the defendant's knowledge of the existence of the mortgage, its comparatively small amount*, and the fact that both parties recognized that it was then due, which would justify the jury in finding that the defendant refused to accept performance, and waived his right to require performance. The defendant's refusal to take a deed was unqualified and *absolute, not founded upon the existence of the incumbrance, or a doubt of the plaintiff's ability to remove it if necessary.* The circumstances attending the refusal, and the terms in which it was expressed, were such as to justify the jury in inferring that to procure a discharge of the mortgage, and make further proffer of it, would be but an idle ceremony, which it was intended to dispense with, thus leaving the defendant wholly at fault in not completing the contract."

The application of these cases to the case at bar is obvious.

The nature of Gray's connection with Donohoe's title was

known to Mills from the outset, and not objected to; that, in the language of Smith vs. Lewis, "he expected some facilities to be furnished by" Mills, was understood and apparent; Mills broke away from the contract on the ground of defect of title, and for no other reason; and it was evident that it would have been useless for Gray to realize on other securities or sell other property in order to receive $165,000 with which to get Donohoe's deed, and put himself in a condition of actual preparation.

II.

A voluntary refusal by one party to a contract to be bound by the contract, made before time for completion has arrived, is equivalent to performance by the other party, and excuses him from showing or having ability to perform.

This is a concise statement of a principle of law, clearly established by the authorities, growing out of the very nature of the contractual relation, explanatory of the apparent confusion between some of the cases touching the effect of a breach of contract upon the question of mutual ability, and affording a broader basis than the considerations which have preceded for the position of the plaintiff in this action.

The general features of the relations of vendor and vendee in contracts for the sale and purchase of land, as far as concerns the matter of tender, breach, ability to perform, and waiver of any or all of these, may be stated in this way:

The obligations of the buyer to pay and of the seller to convey are mutual, dependent and concurrent; neither party can sue until the other is in default; neither can put the other in default until time for performance has arrived, and then only by a tender of performance on his own part; and no such tender is good unless an ability and readiness to perform actually subsist in the party making the tender.

As to the concurrent nature of the conditions and the necessity for tender to put a party in default, see:

Englander vs. Rogers, 41 Cal., 422.
Neis vs. Yocum, 9 Sawy., 24.
Dunham vs. Mann, 4 Seld., 513.
A. & E. Encyc. Law, Vol. 3, p. 910.
Barron vs. Frink, 30 Cal., 488.

And that a tender of performance to put a party in default must be in good faith, having behind it ability and readiness, see :

Champion vs. Joslyn, 44 N. Y., 658.
Cal. C. C., Sections 1439, 1493, 1495.

This is the law when one party seeks to put the other in default. Tender of performance is obligatory, and there can be no valid tender of performance where ability to perform is wanting. Proof of such ability is therefore essential.

But when a party to the contract puts himself in default by his own act or announcement, as by a voluntary refusal to perform, a different condition of things arises.

Superficially it would almost appear that a different doctrine was applied to the case of a breach *before*, to that of a breach *after* time of performance ; or that a distinction was drawn between the case where "one party would put the other in default" and the case of a "voluntary refusal," but a more careful study of the cases will show that the doctrine applied is the same in all cases. It of necessity operates differently—that is all.

The rule, in such case, is that the voluntary refusal of the party excuses all *future* acts to be done by the other party, but does not excuse his *past* delinquency. The contractual relation is, by the voluntary breach, *eo instanti*, dissolved and cut off. Each party must thenceforth stand as to his rights and duties under the contract precisely where he stands at the moment of the breach. As the tree falls, so shall it lie. The party not guilty of the breach is given an immediate right of action for the breach, and in his action he must show that he was not in default of any of his obligations up to the time of the breach, but he need not show any performance of or ability or readiness to perform any of his obligations not existing at the time of the breach, but which

would have rested upon him at a time subsequent to the breach if the breach had not occurred.

The innocent party is "entitled to have the contract kept "open as a subsisting and effective contract, its unimpaired "and unimpeached efficacy might not only be essential to "his 'interests,' but of the very essence of his capacity for "performing his obligations under the contract."

Frost vs. Knight, L. R. 5 Exch., 322.

From all such subsequent obligations he is excused. The breach is equivalent to their performance. He need only show that he himself was not in default at the time of the breach (Cal. C. C., Section 1440); as a matter of course he could not be in default as to obligations or conditions not then due or incumbent upon him.

In a case of voluntary renunciation it becomes necessary, therefore, to inquire what obligations and conditions were, at the moment of the breach, due and incumbent upon the other party, and this must obviously depend upon the *time* of the renunciation, whether it was before or after the time of performance of the contract. If the renunciation occur when or after performance has become due, both parties must be ready and able to perform all the conditions; if any party is not able and ready to perform, he is in default and cannot avail himself of a breach by the other. But if the renunciation occur before the time of performance has arrived, and we shall claim that that was the case here, it occurs at a time when, as we have seen, neither party need be ready or able, and therefore the party suing for the breach need not show that he was then ready or able to perform, or that he ever could have been ready or able to perform. We shall proceed to show that this distinction is amply supported by authority, and is not denied or shaken by any of the cases cited in the Court below by defendants' counsel; moreover, that, in the light of this distinction, all of the cases are harmonized, and the language which, in some of them, when taken by itself, would seem to militate against the views here contended for, is explained and limited so as to confirm the accuracy of the above statement of

the law. In other words, we shall show that in every case the *decision* has been in strict accordance with the distinctions above alluded to.

The position here taken by us was well illustrated in Lovelock vs. Franklyn, 8 Q. B., 371. The suit was upon a contract made by the defendant for the assignment to the plaintiff of a leasehold interest in land upon payment by plaintiff at any time within seven years. Defendant assigned his interest to a stranger. The declaration failed to aver plaintiff's readiness to accept an assignment, and, on demurrer, it was urged (p. 374) that the declaration was bad, because it did not appear therefrom that the plaintiff had the means of purchasing the assignment. "At least," said defendant's counsel, "he should have averred that he would have been ready at some time in the seven years." "(Patterson, J. Must a man say, I now undertake to be ready six years hence? He might die in the interval.") "He ought to show his ability," was the answer of counsel. "Ability at what time?" asked the Court. "At the time of the breach," said counsel. "*Ability at that time is not essential to the maintenance of the action,*" was the final reply of the Court, and the demurrer was overruled.

And so, in Parker vs. Pettit, 43 N. J. L., 517, the Court said: "Where the vendor, before the time for the performance of his contract of sale, has disabled himself from performing his contract, neither a demand of performance, nor a tender of the consideration money, nor an averment of the plaintiff's readiness to accept the goods and pay for them, is necessary."

And in Howard vs. Daly, 61 N. Y., 374, the Court distinctly held it to be "a well settled rule that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party; and, *of course,* without averring performance or readiness to perform."

Crist vs. Armour, 34 Barb., 378, likewise recognized the very distinctions upon which we are insisting. After admitting that in a contract of sale the obligations of the par-

ties are concurrent, and that neither can put the other in default without performance or readiness to perform on his part, the Court held (pp. 386, 387) that, where one party committed a breach by putting it out of his power to perform, before the time of performance, the other was excused from averring or proving a readiness to perform on his own part.

In North vs. Pepper, 21 Wend., 638, the declaration averred that the plaintiff's intestate agreed to sell a farm to the defendant on May 1st; that in January the defendant gave notice to the vendor that he had made up his mind not to take his farm; and that defendant had ever since failed to perform his agreement. There was no allegation of readiness or ability on the part of plaintiffs or their intestate. Objection was made on demurrer to the absence of this allegation. Held, that upon well settled rules of pleading the refusal by the vendee before the time of performance dispensed with an offer or readiness on the part of the vendor, and that the pleading was good.

So in Traver vs. Halsted, 23 Wend., 70, it was held that a similar refusal by the vendee before the day of performance, but withdrawn by the day, would have operated as an excuse for the vendor not to be ready and would have discharged the vendor altogether.

The case of Grandy vs. Small, 5 Jones, N. C., 50, expressly recognizes that in the event of a voluntary refusal by the vendee readiness or ability in the vendor is excused.

"In some cases," said the Court, "not merely the offer, but the readiness and ability, are dispensed with, and the action may be maintained without the proof of either. * * * The principle is this: If a party to an executory contract make a performance impossible, or request the other party not to hold himself in readiness, which is acted on, and thereby he is prevented from being ready and able at the day, he may maintain an action without proof of readiness, ability or an offer."

To the same effect is Clarke vs. Crandall, 27 Barb., 78, where the Court, after citing Traver vs. Halsted, said:

"The cases all speak one language, and are substantial

applications of the rule that where the non-performance of a condition precedent is occasioned by the act of a party, either disqualifying himself for performing on his part, *or by his giving notice that he will not perform*, the party seeking his remedy is not bound to aver performance or readiness to perform."

"It is unnecessary to allege performance, or readiness to perform, on the part of the plaintiff, where it is shown that the defendant has repudiated the contract, or affirmatively refused to perform, or denies liability under it."

Riley vs. Walker, 6 Ind. App. Ct. Rep., 629.

In the decisions we have cited there is frequent reference to the leading cases of Hochster vs. De la Tour, 2 El is & Bl., 678 ; Cort vs. Ambergate, 17 A. & E., 127 ; Frost vs. Knight, L. R. 7 Ex., 111, and other cases of the same complexion, through all of which runs the principle that when one party to a contract, before the time of performance has arrived, voluntarily commits a breach by announcing that he will not perform or by putting performance out of his power, the voluntary breach is the equivalent of full execution and of the performance of all conditions by the other party, so wholly and absolutely that the other party may sue at once for the breach without waiting for the time of performance to arrive, and may, without affecting his right of action, *proceed to disable himself* from performance on his own part : the manufacturer, by ceasing to make the product called for by the contract ; the employee, by accepting another engagement ; the one under contract to marry, by marrying another. The cases of this class are all exemplifications of the rule that voluntary breach, before performance is due, excuses not only performance but ability to perform, and, in this sense and to this extent, is the complete and absolute equivalent of performance.

This should be enough in support of our contention that whatever may be the rule as to the necessity of a proof of ability in order to support a tender or offer made to put a party in default, or where either party defaults after performance has become due by both, a refusal by one party,

before performance is due by either, gives an immediate right of action to the other, which can be enforced without proof of ability on his part, for the reason that he is not bound to have ability at the time the breach occurs.

We shall proceed to show that the cases cited in the Court below to maintain a contrary doctrine are only illustrations of our position. These are :

Nelson vs. Plimpton, 55 N. Y., 480.

The defendant had agreed to store 500,000 bushels of grain for the plaintiffs. Plaintiffs sold to Lincoln & Co. their right under this agreement to the extent of 100,000 bushels, and gave to Lincoln & Co. an order on defendant to store 100,000 bushels. The order being presented to the defendant, and demand being made by Lincoln & Co. for the storage of 100,000 bushels, defendant refused. Lincoln & Co. assigned to plaintiffs their claim for damages for the refusal. The Court held that the defendant was not required by the terms of the contract to accept the order, and that the refusal did not constitute a breach. This was determinative of the whole case, and whatever else was said by the Court as to default and tender and readiness was dictum. But, even if this were not so, the case was one where it was sought to put the defendant in default by a demand. Under the rule above explained, therefore, the demand should have been based upon ability in plaintiffs or their assignee to produce the grain for storage. But it was found that neither plaintiffs nor Lincoln & Co. had grain to store. The demand on the defendant, therefore, was not *bona fide* or effectual, and did not put the defendant in default. What was said by the Court therefore, at the opening of the opinion, although not necessary to the decision, was but an expression of the law, as we have above stated it, touching the necessity of ability behind an offer of performance to put a party in default.

Bigler vs. Morgan, 77 N. Y., 312, was a case of a failure of a party to perform, performance being due by both parties. It was held, in accordance with the rule above stated,

that the other party could not recover damages without showing that he himself was not in default and that he had the ability to perform on his part.

In Lawrence vs. Miller, 86 N. Y., 131, we have the case of a vendee, who had made a partial payment and defaulted in the balance of the purchase price, seeking to recover what he had paid. He was in default himself, had never put the vendor in default by tender, and the vendor had never refused to convey. The judgment for the defendant under the circumstances cannot give much aid to the defendants in this action or shake the correctness of the rules of law on which we rely.

Eddy vs. Davis, 116 N. Y., 247, is of the same complexion as Nelson vs. Plimpton, and illustrates the rule that a tender to put a party in default must be accompanied by ability in the party making the tender—the plaintiffs having called upon the defendant to pay at a time when they themselves were without title.

Grandy vs. McCleese, 2 Jones, N. C., 142, is to the same effect, and simply holds that a vendor of corn could not be put in default without a demand backed by readiness and ability to pay.

And Brown vs. Davis, 138 Mass., 458, merely holds that an offer on the part of the vendee was necessary to put the vendor in default.

That Mills' breach of contract occurred prior to the time when completion and performance were due, and at a time when it was not yet necessary for Gray to have ability to perform, is clear. The contract between Mills and Gray was silent as to the time of performance. Performance, on either side, therefore, was not due until a reasonable time after notice by one to the other that he was ready to perform. To this condition of things the language of the Supreme Court of this State in the similar case of Anderson vs. Strassburger, 92 Cal., 40, is singularly applicable.

It was a case in which the defendant had agreed to convey land of which he was not the owner, but which the owner had agreed to sell to him. "The title," said the

Court, speaking through Judge DeHaven, "was at all times potentially in the defendant, and he was not in default simply because no formal conveyance was made to him by his grantor within the time allowed by plaintiff for examination of the title, nor was there any necessity for him to acquire such title in order to carry out his agreement until plaintiff notified him that he was ready to complete the contract upon his part. The plaintiff was allowed ten days within which to examine the title, and the agreement, in view of all the facts surrounding the parties at the time it was made, contemplated that defendant should receive notice of the approval of the title he was to obtain from Lees, or, if not approved as satisfactory, that he should be informed of any objection which after such examination plaintiff might have to the same, and he was entitled to a reasonable time thereafter within which to perfect his title or remedy any defects discovered by plaintiff, and not until plaintiff gave such notice and offered to fully perform the contract on his part upon receiving a perfect title, and the refusal thereafter of defendant to convey in accordance with the terms of his agreement, would plaintiff have the right to rescind the agreement and recover the amount paid by him thereon."

Thus we see that performance on Gray's part was not due until he was called on by Mills to perform. Mills never made any such demand, but, on the contrary, without making it, and, consequently, before performance was due, repudiated the contract and relieved Gray from going on with it.

We think it should be obvious from the foregoing discussion that the plaintiff's ability to perform in a suit for breach of contract is part of his case, to be affirmatively pleaded and proved by him only where, performance being due, he has sought by a tender or offer of performance to put the defendant in default, or where performance being due, the defendant has put himself in default. If, in cases not coming within these two categories, the defendant should question the plaintiff's ability, it must be by way of special defense, to be affirmatively pleaded and proved by

the defendant, and going to the plaintiff's good faith in entering into the contract at all.

"If," said the Supreme Court of California in Easton vs. Montgomery, 90 Cal., 315, "the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld." But of Gray's good faith in this transaction there can be no doubt. It was not until he had obtained the refusal of Donohoe's land that he accepted Mills' offer. His contract with Mills was based upon the control which he had obtained over the Market street lot.

But further, if the defendants desired to impeach Gray's ability to perform, they should have done so by affirmative proof. This was the view taken by the House of Lords in Mackay vs. Dick (6 App. Cases, 251), as also by the New York Court of Appeals in Stokes vs. Mackay, 147 N. Y., 223. It was contended there that, although a waiver of a tender of certain b nds had been established, "it was incumbent upon Stokes affirmatively to establish the fact that he was in a position to redeem the bonds and able actually to deliver them to Mackay" (p. 231). But the Court held (p. 233) that "the plaintiff was not called upon to establish the fact that had the defendants not waived a tender and a tender had been necessary, he possessed ways and means to produce and present the bonds for acceptance or refusal. Whatever was the real condition of his finances, there was nothing to warrant the inference of an inability to redeem the bonds, and, if presumptions were to be indulged in, the presumption of plaintiff's ability to perform his agreement and to have the means to do so obtained, until overcome by evidence to the contrary. It is very clear, under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which they wholly failed to establish, that the plaintiff was incapable of redeeming the bonds for delivery."

The treatment of the case by the New York Court is in strong contrast to the method pursued by the Court below

in this case, in which, without any proof whatever upon the subject, the Court simply presumed that neither Cavanagh nor Gray could have purchased Donohoe's title, and found affirmatively upon a point of fact which should have been affirmatively proved by the defendants, and as to which they gave no evidence whatever.

The case went off upon a mere presumption without proof as to a point upon which the presumptions were with the plaintiff and the burden of proof on the defendants.

III.

As to Some Minor Points.

It remains only to consider several minor points, which were made by the defendants in the Court below and may be renewed here.

(*a*) It was contended that Cavanagh and Gray never obtained an option on the Market street lot. That, on the contrary, Donohoe's son, acting for his father, refused to deal with Cavanagh, and only dealt with Mills.

But it plainly enough appears from the record (pp. 34 and 45) that Donohoe's refusal was only to give Cavanagh a writing with which he might go on the street and hawk his property about, and, asking the name of the proposed purchaser, and hearing that it was Mills, consented *at Cavanagh's request* to convey the property to Mills, as Cavanagh's nominee. The point is immaterial and does not affect the essence of the transaction, as we shall proceed to explain.

(*b*) It was contended that Gray never had an option on the lot or the ability to demand a conveyance because the option ran in favor of Mills, and not in favor of himself or Cavanagh.

But this is to regard the form rather than the substance, and to ignore the essential character of the transaction. Cavanagh and Gray accepted an option running to Mills because this, by a short cut, effected the object they had in view, which was to bring the title within Mills' reach. Mills knew of the shape which the business had taken,

made no complaint, submitted the abstract to his lawyer, "accepted the benefit of the transaction," and so " consented to all the obligations arising from it " (Cal. Civil Code, Sec. 1589), and was estopped from any defenses growing out of the form of the transaction. If Donohoe had refused to convey, Mills would have had a cause of action against Gray for breach of contract. If Mills had accepted Donohoe's deed, he would have been bound to convey his country lands to Gray upon the payment by Gray to him of the excess of Donohoe's price over the sum payable by Mills to Gray. Mills and Donohoe could not have ignored Gray, and, by dealing with each other behind his back, have deprived him of the benefits of the contract between himself and Mills. Mills had to accept the deed from Donohoe to himself in satisfaction of Gray's obligation to him, or not at all. The option in favor of Mills was therefore the *mode* selected by Gray for performing his contract with Mills, was tacitly accepted by Mills himself, and cannot now be made, by his representatives, an excuse for a failure by Mills to perform his part of the agreement.

It was in Mills' power at any time to bind Donohoe, and get the title by accepting Donohoe's offer, and the duty to do this was one which grew out of the circumstances and was assumed by him.

He was not in a position where he could avail himself of the transaction by exercising the option, or not, just as he pleased, arbitrarily and according to his own ideas of profit or loss to himself. He was obligated, upon Gray's demand, to accept the option and call for the deed.

Moreover, it was immaterial to the issue whether Gray, Cavanagh or Mills could or could not *compel* Donohoe to give effect to his agreement. If from the voluntary act of Donohoe, or otherwise, Gray was in a position to perform at the proper time of performance, this was sufficient. That Donohoe up to the last was ready and willing to give effect to Gray's contract is shown from the fact that after the date of the breach Donohoe voluntarily tendered a deed to Mr. Mills, as also to Cavanagh and as also to Gray.

(c) It was contended that Mills was not obliged to accept a deed from any one but Gray.

This contention finds no support in the authorities.

The question arose in Royal vs. Dennison, 109 Cal., 563, where it was held that if a vendee of land intends to object to a deed from a stranger to himself, he must do so at the time of its tender, that is, when he becomes aware that the vendor is going to make title in that way. Otherwise he will be taken to have waived the objection. This depends upon the same principle as the rule that the vendee is limited, in an action to recover the purchase money, to such defects as he pointed out on the rejection of the title.

Easton vs. Montgomery, 90 Cal., 313.

So in Murrell vs. Goodyear, 1 De Gex F. & J., 448, the Court held that the purchaser, becoming aware that the seller did not have at the time of making the contract a title to the whole fee, but was expecting to get a part of it from another, was bound to make the objection at once.

"But, I say," said Lord Justice Turner, "without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this defendant, it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, 'I treat this as a subsisting contract,' and then afterwards suddenly turn round and say, 'I have a right to revert to my original position. I have a right to destroy that contract, which for months and months during the whole treaty of negotiations upon the title I have treated as a subsisting contract.'"

The language as well as the principle is singularly applicable to this case. The title was rejected by Mills' attorneys for reasons other than the fact that it was not to come through Gray himself. Mills' representatives are therefore to be confined to the objection made at the time of the rejection. But, far beyond this, when Mills learned that the title was to come direct to himself from Donohoe, and not from or through Gray, that was the time for him to make any objection he had on that score, or even, if he pleased,

to rescind the agreement. Instead of that, he accepted, adopted, stood to profit by the situation which Gray had created. He could not have played fast and loose, nor can his representatives now be permitted to take a position which he could not, and, as we believe, he would not have taken. Having treated Gray as the owner of the property, having continued to deal with him after learning that he was not the owner, after submitting the title to the opinion of his attorney, after retiring from the transaction solely on the ground that the title was not good, every principle of fairness, every principle of law touching the relations of vendor and purchaser, under such circumstances, forbids the plaintiff to be now turned away for reasons which were ignored and waived by the parties, and requires that the case shall stand or fall upon the rightness of the reason which induced one of them to withdraw. Every other question is an afterthought, and foreign to the real merits.

Upon the trial in the Court below counsel for the defendants affected to treat this case with some scorn. Gray and Cavanagh were held up to the Court as penniless adventurers, who laid a scheme for the entrapment of Mills by which, without embarking any means of their own, they might profit in trading upon the capital of Mills and Donohoe. The suit itself was stigmatized by one of defendants' counsel as a raid on a dead man's estate.

The plaintiff's case was certainly presented under many disadvantages. Mills, Donohoe, Cavanagh, Jarboe, all actors in the drama, had passed from the scene before the trial; the lips of the plaintiff were sealed by Subdivision 3, of Section 1880, of the California Code of Civil Procedure, and the proof was mainly restricted to documents bearing upon the transaction. And yet, even from this meagre evidence, as we most earnestly and seriously contend, enough appears to fully make out a case which on its merits is entitled to the respectful consideration of any Court.

The criticism that Gray and Cavanagh did not invest their own means in the arrangement with Mills and Donohoe is one which would apply to every negotiation in which

men make money by the use of skill, knowledge of the markets, or study of the wishes or necessities of others, rather than by the actual investment of capital. It is answered by the language of the Court in Trask vs. Vinson, 20 Pick., 105 : " We know of no rule of law or principle of sound policy which prohibits a person from agreeing or covenanting to convey an estate not his own. He might have authority from the owner to sell, or he might have the refusal of the estate, or he might rely upon his ability to purchase it in season to execute his contract."

Gray and Cavanagh simply knew that Donohoe was willing to sell his city property and that Mills wished to get rid of his country lands. Instead of bringing the two men together and, by acting as mere brokers earning a mere commission, they preferred to be principals themselves in the transaction, and, by assuming the risks, to run the chance of making the profit growing out of the divergence of views between Mills and Donohoe as to the values of their respective properties. In this way the wishes of both Mills and Donohoe were met. If the transaction had been carried out Donohoe would have got his price in cash for his lot. Mills would have been relieved of his country lands and would have invested his money in city property. Without the intervention of Cavanagh and Gray it is by no means sure that this result could have been attained. It is not certain that Donohoe would have taken $120,000 in cash and the country lands for his lot, or that Mills would have given $165,000 in cash for it. But Cavanagh and Gray were willing to take the risks and to stand in the breach. If the business had been done they would have obligated themselves personally to the extent of $45,000 and have assumed the burden of carrying the country lands, and to this extent they would have been and were principals, contributing to the transaction their individual liability, as well as their knowledge of the values of real estate.

The insinuation that they in the least degree misled either Mills or Donohoe must fall to the ground for want of any foundation in fact. The disclosure to both of them of

the real nature of the negotiation was complete, and both of them fully accepted all its terms without complaint.

We submit with great confidence to this Court that, so far from the transaction or this suit being of a questionable nature, the record discloses a perfectly proper and business-like affair, conducted on Gray's part with the utmost frankness, by which all parties would have been benefited, and which failed through no fault of his. An unwarranted and unfounded rejection of title, for which Mr. Mills and his attorneys were responsible, prevented the execution of the arrangement and caused a large loss to Gray, which should be made good to him by Mills' estate. The attempt of defendants' counsel, by baseless suggestions of impropriety in Gray's conduct, to divert the attention of the Court from the injury done to Gray through Mills' unexcused breach of contract, must be as useless as it is unfair.

SIDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

No. 359

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. PRENTISS SMITH, FRANK MILLER and WILLIAM HARRINGTON,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

S. C. DENSON,
Counsel for Defendants in Error.

Filed June....., 1897.

.....*Clerk,*

By.....*Deputy Clerk.*

In the United States Circuit Court of Appeals for the Ninth District.

ALBERT E. GRAY,
Plaintiff in Error,
vs.
S. PRENTISS SMITH, FRANK MILLER and WILLIAM P. HARRINGTON,
Defendants in Error.

No. 359.

Statement of the Case.

The action is one at law to recover damages against the executors of Edgar Mills, deceased, for an alleged refusal of the decedent to comply with the terms of an agreement for an exchange of lands. The agreement, consisting of a written proposal upon the part of Edgar Mills addressed to the plaintiff under date of September 16, 1891, and its acceptance in writing by the plaintiff on October 7, 1891, is set out in full in the complaint, and the making of the agreement as thus alleged is not denied by the answer.

The contract alleged is in substance one upon the part of the decedent Mills to give, in exchange for a certain lot situate on Market street in the city of San Francisco, $120,000 in cash and certain described lands of his situate in Colusa and Tehama counties. The contract will be found set out in full in the findings of the court, numbered 1, 2 and 3, commencing on page 27 of the printed transcript.

It is not alleged in the complaint that the plaintiff performed or offered to perform the contract on his part, but it is alleged: "that the plaintiff was able, ready and willing from October 7, 1891, to and until November 18, 1891, to sell and convey to said Edgar Mills said Market street lot by a good and sufficient deed conveying to the said Edgar Mills a perfect title to said lot, but on said November 18, 1891, said Edgar Mills refused to buy said lot or to accept a conveyance thereof, and refused to comply with or carry out his said agreement to buy said lot as aforesaid on the ground and for the reason that the title thereto was imperfect." (Transcript, page 8). The answer of the defendants denies that the plaintiff was able, ready or willing to sell or convey the property agreed to be sold by him, or that said Mills at any time refused to carry out his part of said alleged contract of sale or purchase, either in whole or in part, or that he refused to purchase the property so agreed by him to be purchased or to accept a conveyance thereof made or tendered under or by reason of or in performance of said alleged

contract of sale and purchase (transcript, page 20).

The Findings.

The Court does not find specifically that Mills ever refused to carry out his agreement with plaintiff, or that plaintiff at any time ever gave him notice that he was ready and willing to make a conveyance of the Market street property in accordance with the terms of the agreement alleged in the complaint.

The Court finds that the plaintiff was never the owner of the property which, under the agreement, he contracted to convey to the decedent Mills, but that one Donahoe was such owner, a fact of which defendants' testator was not informed until after the making of the contract alleged in the complaint (transcript, page 37; finding no. 6), and that plaintiff never at any time had any contract with the owner by which he could secure the title to such property (see finding number 9, transcript page 36); but the Court does find that one Cavanagh, who was interested with plaintiff in making the exchange of the properties contemplated by the agreement set out in the complaint, endeavored to enter into a contract with its owner for the purchase of the Market street property, but that said owner, not knowing anything of the resources or responsibility of the said Cavanagh, refused to enter into any contract with him, but did, upon being informed by said Cavanagh that he desired to make the purchase for the decedent Mills, give to said Cavanagh a written offer in

these words: "San Francisco, October 7, 1891. I hereby agree to sell my lot, 82 6-12 feet on south side of Market street, immediately east and adjoining the Central Park, between Seventh and Eighth streets, and running through to Stevenson street in the rear, to Edgar Mills for one hundred and sixty-five thousand dollars, U. S. gold coin ($165,000), payable on delivery of deed after examination of title, say fifteen days from date. The purchaser to pay half of the taxes for the current year." (See finding number 6; transcript, page 34). The Court further found that decedent Mills rejected said offer (see finding number 6; transcript, page 36), and it may be inferred from finding number 12 (commencing transcript page 38) that Mills rejected the foregoing offer because he was advised that there was a defect in the title to the Market street lot. The Court further finds (see finding number 11; Transcript, page 37) that "Plaintiff never paid or offered to pay to said Joseph A. Donohoe, senior, the purchase price demanded by the said Donohoe for the said Market street lot, and did not at any time have the means or ability to pay the said Donohoe the purchase price demanded by him for the said Market street lot, and plaintiff never took any steps to procure for the said Edgar Mills the title to the said Market street lot other than by procuring the written offer of said Donohoe, dated October 7, 1891, which offer is fully set out in finding number 6.

Upon these findings and others not necessary to re-

fer to the Court found as a conclusion of law "that said plaintiff was never at any time able or ready to convey or cause to be conveyed to the said Edgar Mills the said Market street lot according to the terms of the contract set out in the complaint," and thereupon directed a judgment for the defendants.

The opinion of the Circuit Court is reported in 76 Federal Reporter, page 525.

The Question for Decision and Points and Authorities for Defendants in Error.

It is claimed by the plaintiff in error that the finding of the Court above quoted to the effect that plaintiff did not have the means or ability to pay the purchase price demanded by its owner for the Market street lot is not sustained by the evidence. In view of the other findings we do not think the finding so excepted to is essential to the maintenance of the judgment of the Circuit Court, but still we contend that the state of the evidence was such as to warrant this finding of the Court. We shall contend for the following propositions:

I.

Under the findings of the Court not excepted to, the plaintiff was not at any time the legal or equitable owner of the Market street lot which, under the contract alleged in the complaint, he contracted to convey to the defendants' testator; nor was the owner of such lot willing, upon the request of plaintiff, to convey the

same to said testator upon the terms of the contract alleged in the complaint. Upon this state of facts the conclusion of the Circuit Court "that said plaintiff was never at any time ready or able to convey or cause to be conveyed to the said Edgar Mills the said Market street lot according to the terms of the contract set out in the complaint" is a correct statement of the law and will be found to be sustained by the following authorities:

Eddy vs. Davis, 116 N. Y., 247.
Biggler vs. Morgan, 77 N. Y., 318.
Lawrence vs. Miller, 86 N. Y., 137.
Brown vs. Davis, 138 Mass., 458.

and other cases which will be cited in other portions of this brief for the purpose of illustrating this point.

II.

The Court was justified in finding that plaintiff did not have the pecuniary ability to secure the title to the lot which he contracted to convey, and the plaintiff, having failed to show that he was possessed of means to secure the title to such property upon the only terms upon which its owner would agree to part with such title, he failed to show in this respect also that he was able and ready to comply with his contract to make such conveyance to defendants' testator.

Grandy vs. Macrease, 2 Jones, N. C., 142.
Grandy vs. Small, 5 Jones, N. C., 55.
McGee vs. Hill, 4 Porter, 107.

Argument in Support of the Foregoing Propositions.

1. It is clear that upon the facts found by the Court the plaintiff was never at any time the legal nor the equitable owner of the land which he contracted to convey, and that defendants' testator was not informed of this fact until after the making of the contract set out in the complaint. It is clear also that the property was not in any manner under the control or direction of the plaintiff and that its owner was not willing to convey it to the defendants' testator upon the terms upon which plaintiff had contracted to convey it and for the purpose of carrying out that agreement on the part of the plaintiff. Under these circumstances we say that plaintiff failed to show an ability and readiness to perform the contract on his part. In asserting this proposition we do not, as was supposed by the learned Circuit Judge, run counter to the rule declared in Easton vs. Montgomery, 90 Cal., 307. In that case it was held, and we think rightly, that it is not necessary to the validity of a contract that the vendor should be the absolute owner of the property at the time he enters into an agreement of its sale. The Court there said: "An equitable estate in land or a right to become the owner of the land is as much the subject of sale as the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the

sale thereof. * * * * If the agreement is made by him in good faith and he has at the time such an interest in the land or is so situated with reference thereto that he can carry into effect the agreement on his part at the time he has agreed so to do, it will be upheld."

We do not dispute this proposition. The question here is not whether an equitable owner of land, who contracts to convey it, can recover damages for the breach of such a contract if he himself was able to perform it, but whether the plaintiff here, having entered into a contract to convey land of which he was neither the legal nor equitable owner—either then or subsequently—can maintain an action for an alleged breach of such contract; in other words, whether such a vendor is damaged by the refusal of the vendee under such contract to perform it on his part.

"A vendor of real estate has two remedies for the breach of a contract. He may insist upon its specific performance or he may maintain an action at law for damages. In an action at law for damages "the vendor must be held strictly to the very terms of his engagement, and show the performance of all the conditions on his part necessary to be performed to put the other part in default" (Smythe vs. Sturges, 108 N. Y., 503). An action for specific performance may be maintained without a previous tender; it is sufficient if the plaintiff offers in his complaint to perform, and is able to do so at the time of the trial. But when the vendor himself does not ask for the performance of the contract accord-

ing to its terms—does not ask to be placed in the exact condition where he would be upon the performance of the contract, but instead goes into a court of law demanding damages for its alleged breach by the vendee, in such case it is incumbent upon him to show a strict compliance with the contract on his part and to show a formal and technical default by the vendee. And this can only be done by proof that the vendor was at the time of the alleged breach able and ready to comply with the contract on his part. "The distinction between an action for specific performance in equity," said the Court in Bruce vs. Tilson, 25 N. Y., 197, "and a suit at law for damages for non-performance is this: that in the latter the right of action accrues out of the breach of the contract and a breach must exist before the commencement of the action, while in the former the contract itself and not the breach of it gives the action."

And certainly before the plaintiff here can be entitled to recover damages by reason of his vendee's refusal to take and pay for the land which plaintiff agreed to convey, the plaintiff must show that he was the owner of such land, or at least in such a situation in regard to it that he could cause the conveyance to be made on the exact terms of his contract. The rule applicable to a case like this is concisely stated by Wilde, C. J., in Dogood vs. Rose, 67 Eng. Common Law Reports, page 137, as follows: "It seems to me that the acts to be done by the plaintiff on the one side and by the de-

fendant on the other were to be contemporaneous; *and that before the plaintiff complains of the non-performance of the contract by the plaintiff he should have put himself in a condition to ask performance by being prepared to deliver what the defendant was entitled to receive.* This performance on the part of the plaintiff may be dispensed with or discharged by a notice from the defendant that he does not mean to execute the contract on his part. Now, what must the plaintiff in such a case aver? He must, I apprehend, at least aver that he was ready and willing to execute the deed and that the defendant had notice of his readiness and willingness."

The refusal or inability of the vendee to perform is not sufficient of itself to give a cause of action to the vendor. The vendor must also have been at the time of such refusal, or when performance on his part is due, able and ready to perform. This is the way the rule is stated in Biggler vs. Morgan, 77 N. Y., 388: "To entitle him to recover damages for a breach of the contract he must show that he was ready and willing to deliver such a deed as the contract called for. The refusal of the defendant to perform, although it obviated the necessity for the formal tender of a deed, did not dispense with the necessity of showing that the plaintiff was able, ready and willing to perform, and ordinarily this requires that the deed called for by the contract should be prepared and ready for delivery. * * * Morange vs. Morris, 32 Howard Practice, 178, and 3

Keyes, 50, is cited as an authority for the proposition that in an action like this the refusal or admitted inability of one party to a contract of this description to perform dispenses not only with an actual tender of performance by the other party but with proof of his readiness to perform. That case is not an authority for any such proposition. It was not an action to enforce the contract or for damages for its breach, but to recover back a payment made on account of the purchase money on the ground that the vendor, not being ready at the time appointed to convey good title, the vendee had exercised his right to rescind and reclaimed what he had paid. The cases are widely different and depend upon different principles. A contract for the purchase or exchange of lands may be rescinded, and the purchase money paid in advance may be recovered back on the failure of one party to perform, even though the other party could not have performed. If in this case neither of the parties had had title to the property which he had agreed to convey the contract could have been rescinded and any payments made upon it could have been recovered back, *but neither could have recovered from the other damages for its breach.* In an action to rescind and recover back payments it is enough to show a breach by the party who has received the money (Florence vs. , 5 Hill, 115), but not so when the action is to enforce the contract or recover damages. However positively a vendee may have refused to perform his contract, and

however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed."

There being no doubt about this general principle of law, that no one can recover damages for the breach of a contract without showing that he was himself able and ready to perform at the time of such alleged breach we are brought to a consideration of the question as to what constitutes ability and readiness on the part of a vendor to convey land. Can he be said to be thus able without showing that he has the legal title, or at least has such legal title subject to his personal control and ready to be passed to the vendee upon the exact terms of the contract of purchase? In our judgment this question must be answered in the negative. Ability and readiness to perform signify *ex vi termini* a present ability. When used with reference to a vendor's agreement to convey land these words necessarily imply the possession of a title which can be exhibited as a record title and one which is apparently perfect when exhibited and which the vendor is then ready to convey or cause to be conveyed to the vendee. A vendor who has agreed to convey the legal title cannot maintain an action for breach of such contract without showing that he had the ability to vest such legal title in the vendee at the time of the alleged breach. We are not now speaking of the validity of a contract made by a vendor at a time when he has no title to lands and of

his right to enforce the same when he subsequently acquires the title, but we allude to what the vendor must show in relation to his title before he can maintain an action at law for damages against a vendee. In such an action, as we have seen, the vendor is held to a strict performance of his contract. He must show with great strictness his ability and readiness, and the vendee must have notice of such ability and readiness before he can be placed in technical default. We do not think, in such an action, it would be sufficient for the vendor to simply prove that he had an equitable title which might be turned into a perfect legal title by the ordinary course of equity; and *a fortiori* he would fall far short of maintaining his case if he proved no more than that the real owner was willing and ready to convey to him such land, but that he had not entered into any contract with him which entitled him to purchase and acquire title to the same and therefore that he did not have even an equitable title. Indeed, it may be safely asserted that a vendor cannot recover damages at law for an alleged breach of contract by the vendee when, upon the same facts a court of equity would not decree a specific performance if the vendor were in that court asking for such relief. The facts required to be shown are precisely the same in the two cases except that in the equitable action it is sufficient for the plaintiff to show his ability to comply with the decree of the Court at the time of the trial, while in the action at law such ability and readiness must be shown to have ex-

isted at the time of the alleged breach. It would be a singular rule of law that would permit a vendor who never at any time had such a title to the land he contracted to convey as would entitle him to ask for a specific performance of the contract in a court of equity, to recover in a court of law damages for non-performance of such contract by the vendee.

Ability and readiness to perform have reference to a present condition and not to a condition which may or would result from some future contract if it should be brought into existence. The case of Brown vs. Davis, 138 Mass., was an action for breach of a contract to convey lands, by the terms of which contract the plaintiff was to make payment within four months of its date. At the time of the contract the defendant, who was executor of an estate, was not able to convey the title, as he had not then obtained a license from the Probate Court to sell. It was shown upon the trial that plaintiff, within the four months named in the contract, made arrangements with one Richards for a loan of the sum of money necessary to enable him to perform his part of the contract; that Richards agreed to make such loan provided the defendant could give the plaintiff a good title to the premises, and thereupon, within the life of the contract, the plaintiff informed the defendant that he could get the necessary amount of money from Richards if the defendant could give him a good title. No formal tender was ever made by the plaintiff to the defendant, and upon the

expiration of the four months fixed in the contract the defendant sold the land to another person. The Supreme Court held upon these facts that the plaintiff was not entitled to maintain the action, and said: "There was no time when the plaintiff had prepared himself to perform presently his part of the contract. Neither party took sufficient steps to hold the other. It is no doubt true that an actual tender of the money by the plaintiff was not necessary, but he must show that he was ready, willing and able to do his part and that the defendant had notice thereof. Nothing short of this would put the defendant in legal default. The maxim that the law does not compel one to do vain and useless things does not apply to a case like this. Here both parties remained inactive in the eye of the law. What the plaintiff did by way of arranging for the money was merely preliminary and was quire insufficient to give him a right of action."

It will be observed that in the case just referred to the plaintiff had actually made arrangements by which he could have obtained the money necessary to carry out his contract, provided the defendant could give him a good title, and the defendant was notified of such fact, and yet the Court, speaking with reference to these specific facts, said: "There was no time when the plaintiff had prepared himself to perform presently his part of the contract. * * * * What plaintiff did by way of arranging for the money was merely prelim-

inary, and was quite insufficient to give him a right of action."

In the case of Eddy vs. Davis, 116 N. Y., 247, the plaintiff had contracted to convey certain property to the defendant, and as part of such contract agreed to keep open a right of way back of the property which he had contracted to sell. At the time of this agreement the plaintiff owned property over which he could have given such right of way, but he afterwards sold the same without any reservation of a right of way to the land which he had agreed to sell to the defendant, and at the time of the commencement of the action owned no property over which he could give such a right of way. The action was brought to recover an installment of the purchase money, and the Court found that the plaintiff had never tendered a deed to the defendant, but that the defendant had waived such tender, and no tender was necessary because "immediately before the commencement of this action the plaintiff's attorneys applied to said defendant and informed him that the plaintiffs were ready and willing to perform said contract on their part if he was ready to pay; to which defendant answered that he could not pay, and said that he wanted to give up the property." Upon this state of facts the Court of Appeals said: "It is undisputed that within two months after the defendant entered into possession of the property plaintiffs sold all their adjoining land, and thus put it out of their power to comply with their agreement with defendant, and keep

open a right of way to the rear of his store; and at the time of the offer mentioned in the finding of fact I have quoted, the plaintiffs were powerless to fulfill their engagement. The finding, therefore, that they were ready to perform, or that their offer and defendant's refusal constituted a waiver of tender of the deed cannot be sustained. A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be existing capacity to perform." (Nelson vs. Plimpton Elevating Co., 55 N. Y., 484; Lawrence vs. Miller, 86 id. 137; Bigler vs. Morgan, 77 id. 318).

The case from which we have just quoted is a direct authority to sustain the proposition that a vendor, who has agreed to convey a legal title to property, but who does not in fact have such title, cannot maintain an action upon the contract upon the refusal of the vendee to perform. That case was a much stronger one in favor of the vendor than the case presented here for the plaintiff. In that case the vendee announced that he could not pay for the property, and that he wished to give it up, while here there is no express finding by the Court that defendants' testator ever refused to carry out the contract alleged in the complaint, but only that he rejected an offer to purchase the property from the owner upon terms different from those upon which the plaintiff had agreed to make such conveyance to him. But assuming that he did refuse, the case just quoted

from is an authority for our contention that the plaintiff, not being the owner of the property he contracted to convey, cannot maintain this action.

That a vendor who is not the owner, either legal or equitable of the property which he has agreed to convey cannot enforce such contract, is also shown by that class of cases which hold that a vendee, upon discovery that his vendor has no title, may at once rescind the contract and recover back any payment that he has made thereunder. This is the rule declared in Goetz vs. Walters, 34 Minnesota, page 239, and which case is approved by the Supreme Court of California in Burks vs. Davies, 85 Cal. 110. The case of Goetz vs. Walters was an action by a vendee to recover money paid to a vendor on an agreement for the purchase of a house and lot, the plaintiff alleging that the defendant was not the owner of the premises agreed to be conveyed. The answer alleged that the plaintiff had repudiated and expressly refused to be bound by the agreement before the commencement of the action, and alleged that since the commencement of the action the defendant had acquired title to the premises, and was then ready and willing to perform. The Court held that the plaintiff was entitled to a judgment on the pleadings. The Court in that case say: "He (the vendor) was bound to be prepared at all times to convey a good title, and whenever within that time she should ascertain that he had no title so that it was impossible for him to make a conveyance, she could at once avoid the

contract without going to the useless trouble of tendering payment and calling on him to convey. The answer admits that she did so on May 15th, and thereupon it was the duty of the defendant to repay to her the $300."

In Burks vs. Davies, 85 Cal., 110, an action by a vendee to recover money paid on a contract, the Court say, quoting from Sugden on Vendors: "Where a person sells an interest, and it appears that the interest which he pretends to sell was not the true one * * * the purchaser may consider the contract at an end, and bring an action for money had and received to recover any sum of money which he may have paid in part performance of the agreement of sale." And the Court in that case further said: "Under a contract for the sale of real estate the vendee is regarded as the equitable owner, and the vendee a trustee of the legal estate for him. If the vendor has no title to the property the vendee is entitled to a rescission." It is true the Court in the present case finds that there was no rescission or abandonment of the contract; but it needs no argument to show that upon facts which entitle the vendee to rescission the vendee cannot be subjected to damages for a refusal to perform; and notwithstanding the finding of the learned Judge of the Circuit Court, we may be permitted to say that if the defendants' testator ever did refuse to perform this contract, it was in legal effect a rescission on his part. One who has a right to rescind a contract and recover back all that he may

have paid thereunder must necessarily have the right to refuse to perform the contract, without subjecting himself to the payment of damages, and such a refusal would amount to a rescission. To sum up the argument on this point, the findings show that the plaintiff was never at any time the legal or equitable owner of the land which he contracted to convey; and that defendants' testator first learned that plaintiff was not the owner of such land after entering into the contract set out in this complaint; and further, that the real owner of such land would only convey it to the defendants' testator upon terms materially different from those upon which the plaintiff had agreed to make the conveyance. The findings further show that the real owner was not willing to make a contract with any other person than the defendants' testator for the sale of such land, so that in effect the only means by which said Mills could obtain the title to said property was by entering into a new and different contract with its owner. The Court finds that Mills refused to enter into this new contract. Such refusal does not constitute a refusal to carry out the contract alleged in the complaint; and although we may be morally certain that he would have refused to accept a conveyance from the plaintiff even if tendered to him upon the terms of the agreement set out in the complaint, still the refusal actally made did not constitute a breach of his contract with plaintiff, nor relieve plaintiff of his obligation, if he desired to recover damages for its alleged breach, to

be able to perform it on his part. Without such ability and readiness on his part it was not possible for him to put Mills in technical default.

II.

The plaintiff in error excepts to the finding of the Court to the effect that he did not at any time have the means or ability to pay the purchase price demanded by its owner for the Market street lot, and claims here that such finding is not sustained by the evidence. If the proposition already discussed by us is sustained it will be at once seen that the question whether the finding referred to is or is not sustained by the evidence is immaterial. We think, however, that in any possible view of the case, since the owner of the lot refused to convey it except upon the payment of $165,000 in cash it was incumbent upon the plaintiff to show that he was in a position to acquire such title upon the only terms upon which its owner would make the conveyance. There is no presumption of law, independent of proof, that he would have been able to acquire this title even if defendants' testator had signified his willingness to accept the same. Therefore, it was necessary for the plaintiff to prove the fact if it was material; and the bill of exceptions showing that the plaintiff failed to introduce any evidence whatever upon this point the Court was justified in finding the fact against the present contention of the plaintiff. The rule is, if no evidence or no sufficient evidence be introduced in rela-

tion to any fact, the finding should be against the party upon whom was the burden of proving such fact. (Levingston vs. Ryan, 75 Cal., 293).

That the burden of proof was upon plaintiff to show that he was in a position to acquire the title to the lot he contracted to convey we think clear, and when it is conceded that he could not acquire this title without the payment of $165,000 in cash it necessarily follows it was incumbent upon him to show that he was possessed of means of his own sufficient to make such payment or was able to secure a sufficient loan for that purpose. And it is equally clear under the authorities that the plaintiff is required to show that he possessed this ability independent of performance upon the part of Mills (McGee vs. Hill, 4 Porter, 170), in which case the Court said: "It is a well settled rule of law that when a contract is dependent, as where one agrees to sell and deliver and the other agrees to pay on delivery, in an action for non-delivery it is necessary for the plaintiff to prove a readiness to pay on his part whether the other party was ready at the place to deliver or not. * * * * The instructions of the Court, therefore, that if the jury believed that the credit which the corn and fodder when delivered might give, together with the other means of the plaintiff, would have enabled him to raise the money so as to have been prepared to pay, that would be sufficient evidence of readiness was erroneous."

So, also, in Mount vs. Lion, 49 N. Y., 552, in which

case the plaintiff sued for breach of contract to sell and deliver brick, the Court said: "It was not necessary that the plaintiff should have during the whole of the three months or on any day during that time a sum of money in hand sufficient to pay for the whole quantity of brick called for by the contract. It was sufficient that he had the means and resources at his command which would have enabled him to pay had the brick been delivered."

So, also, in Bronson vs. Wiman, 4 Selden, 188, an action for breach of a contract for the sale and delivery of flour. The Court say: "The plaintiffs were under no obligation to prove payment or a tender of payment. It was enough that they were ready at the time and place appointed for the performance of the contract to receive and pay for the flour. * * * Wing was apprised of the agreement and furnished with a copy, and he declared to his clerk that he was ready to pay for the flour if it arrived; and in confirmation of this declaration it was shown that he paid promptly all demands against him and that he had facilities for raising money to an amount sufficient to pay for 2000 barrels of flour. This evidence was abundantly sufficient to take this question to the jury and authorize a finding in behalf of the plaintiffs."

We do not understand that the case of Stokes vs. Mackay, 147 N. Y., is authority for the proposition that the burden of proof was upon the defendants in this case to show that plaintiff did not have sufficient funds

to purchase the Market street lot. That was an action to recover the balance due upon the purchase price of certain bonds and stocks, the greater portion of which had been delivered to defendant under the contract and retained by him. It appeared upon the trial that after the repudiation of the contract by the defendant the plaintiff had pledged a portion of the stock and bonds agreed to be sold, and the Court held that under the pleadings it was not incumbent upon the plaintiff to show that his finances were in such condition that he could redeem the bonds at the time of the trial. The Court said: "It is very clear under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which they wholly fail to establish, that the plaintiff was incapable of redeeming the bonds for delivery." The Court further said: "Under the allegations of the complaint the defendants might at any time after the action was commenced, have demanded the bonds yet undelivered upon offering to pay the $75,000 claimed from them. If their delivery had become impossible to the plaintiffs the defendants would have had the right to compel him to account for all he could not deliver, but nothing which could happen to the bonds after the right of action had vested and was availed of could divest such right of action. That some of the bonds remained pledged to others to secure liabilities of the plaintiff proves nothing against his right of recovery. If he could not redeem them he could be compelled to

account for the moneys received for them. If any had been converted or passed beyond his control after the commencement of the action and without default on his part, at most if at all, under the circumstances, he could be compelled to account for their actual value. * * * The defendants have at all times been entitled upon offering to pay the $75,000 to have the bonds. Their payment of this judgment will leave them still entitled to demand them, and a failure to deliver them will create a cause of action in their favor for their value."

The Court will see from the foregoing quotation that the question discussed in Stokes vs. Mackey is widely different from that which is presented by the case at bar.

But in addition to the fact that plaintiff failed to introduce any evidence tending to show his ability to acquire the title to the Market street property independent of the performance by Mills of the contract alleged in the complaint his counsel virtually conceded upon the trial of the action in the Circuit Court, that plaintiff was without such ability, and in their printed argument addressed to the Court used this language: "Upon this payment and conveyance by Mills to Gray depended Gray's ability to produce Donohue's deed—depended so utterly and wholly that Mills' refusal to go amounted to an absolute prevention of Gray's performance. Every fact in the case points to the moral conviction that if Mills had lived up to his

contract by paying his $120,000, and conveying to Gray the country lands, Gray would have been abundantly able to carry out his part of the contract. Herein lay Gray's ability—in the anxious readiness of Donohue to live up to his engagement, in the fact that Mills' land and money which, under the contract, belonged equitable and potentially to Gray, would have enabled him to pay Donohue and procure the deed. * * * Morally we know that if Mills had not retired the transaction would have gone smoothly through, and that Mills' conduct was the sole cause of its defeat. Morally we know that Gray could not fulfill his engagement unless Mills on his part fulfilled the obligations arising from his acceptance of the benefits of the transaction and his knowledge of the facts." Transcript page 47.

Having thus conceded the fact of plaintiff's inability to procure the money with which to acquire the title to the land which he had agreed to convey independently of performance upon the part of defendants' testator, the plaintiff in error has no legal ground of exception to the finding of the Court in accordance with such admission. In other words, even if it should be held that the burden of proof was on defendants to show that plaintiff did not have the pecuniary ability to purchase the Market street lot, the Court was justified in assuming as against the plaintiff the truth of his counsel's admissions.

Conclusion.

We think upon the record this judgment must be affirmed. It would be singular, indeed, if one who has contracted to sell land which he does not own, and to which he does not have even the shadow of an equitable title, and who is further without pecuniary ability to acquire such title, could recover damages against his vendee for breach of such contract simply because the vendee, in considering an offer made to him by the real owner, refuses to enter into such new contract, although he may give as a ground for such refusal that he does not consider the title to such property good. The contract set out in the complaint did not impose upon Mills the obligation to accept the subsequent offer made to him by the real owner of the property, and his rejection of it, no matter what reason he may have given for such rejection, was not a breach of the contract alleged in the complaint.

We respectfully submit that the judgment should be affirmed.

S. C. DENSON,

Counsel for Defendants in Error.

No. 359

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington,
Defendants in Error.

Answer to Reply of Defendants in Error.

SIDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

Writ of Error to the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

Filed ..... *1897.*

..... *Clerk.*

DEMPSTER BROS LAW PUBLISHERS BOND & GLEN PARK S F

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY, *Plaintiff in Error,* vs. S. PRENTISS SMITH, FRANK MILLER and WILLIAM HARRINGTON, *Defendants in Error.*	No. 359.

Answer to Reply of Defendants in Error.

We asked leave to file the following answer to the brief of defendants in error for the reason that their brief does not reply to anything in the plaintiff's brief, but is confined to a point which was never raised in the trial Court, and which, therefore, we could not have anticipated, and which we considered misleading. This misleading point is the attempt to read together the contract between Gray and Mills, and the written agreement signed by Donohoe, and thereby to make it appear that Mills was affected by or could base a defense to Gray's claim upon the terms of the Donohoe document.

The Donohoe agreement was not an "offer;" it was a written *acceptance* of Cavanagh's offer, a written undertaking to give effect to Gray's negotiations with Mills that Cavanagh had brought to his notice. It required no "accept-

ance " to give it force or effect. It was simply an authority for Gray to close his negotiations with Mills, and a means whereby he could carry them into effect; that the document was thus understood both by Donohoe and Mills is abundantly apparent.

This, however, is of no real importance, for, whatever the documents may be called, it is clear that they cannot be read together as forming the mutual agreement between the parties, the breach of which forms the present cause of action.

Any attempt to read two documents together as forming one agreement would fail unless it could at least be shown not only that the date of the instrument and subject matter thereof were the same, but that, for obvious reasons, there was also identity of parties.

The law is too well settled to require argument; we will, however, quote Craig vs. Wells, 11 N. Y., 315; Cornell vs. Todd, 2 Denio, 130; Warvelle on Vendors, pp. 134, 135.

Defendants' counsel appear to be very anxious to mix up and confound these two several and distinct documents; thus on pages 4 and 17 of defendant's brief attention is called to the fact that Mills rejected Donohoe's "offer;" on pages 5 and 7 it is stated that Donohoe would not have conveyed upon the terms of the Gray-Mills contract, and on page 20 it is said that the Court below found that Mills refused to enter into a new contract, meaning a contract with Donohoe on the terms of the latter's "offer."

And in the conclusion, page 27, counsel repeats: "It would be singular if one * * could recover damages against his vendee for breach of such contract simply because the vendee in considering an offer made to him by the real owner refuses to enter into such new contract.

All this is merely a false scent thrown across the trail.

It is because we fear that this attempt to confound the two documents may confuse the Court that we have asked leave to file this additional brief.

A mere suggestion of the distinction between the two should suffice to render it apparent. The offer of Mills, which was accepted by Gray, is the contract out of which the rights and obligations of the parties arose, and for the

breach of which by Mills this action is brought. That breach consisted in a withdrawal from it by Mills, upon the advice of his attorneys (Trans., page 42, Finding 12); the rights of the plaintiff were then fixed and could not be affected by the subsequent tender made nearly a week later by Donohoe of his own volition (Trans., foot of page 37) for a different purpose (Trans., page 38), or its rejection by Mills.

Donohoe's written undertaking to sell or to convey the property to Mills was only the mode adopted by Gray to fill his obligation to Mills; it was a link in Gray's chain of title; with its terms Mills had nothing to do. Mills could not be called upon to pay Donohoe $165,000 in cash or one-half of the current year's taxes. And if Mills had accepted the title and had stood ready to comply with his agreement with Gray, Gray could not have complained if he had declined simply to make the payment to Donohoe required by the terms of Donohoe's offer. But a full compliance with his contract with Gray, as expressed in their written agreement, and as implied by the circumstances, was incumbent upon Mills, and if he had fulfilled his own obligations by paying the purchase price agreed on between him and Gray, and by allowing Gray to get in Donohoe's title in his name, as he was bound to do, this litigation could not have arisen. Instead of this he broke off from Gray altogether, and dispensed with Gray's obligation to furnish him the title. Viewed in this way, Donohoe's written agreement or undertaking to give effect to the Gray-Mills negotiations only figures in the case,

1st. As showing good faith on Gray's part in contracting to sell;

2nd. As showing Gray's ability to perform, though such a showing was not strictly necessary;

3rd. As a means in Gray's hands, though in Mills' name, to fulfill his contract of sale.

But it cast on Mills no additional active obligation; nothing beyond the passive duty of allowing Gray to get in the title through its instrumentality.

As to the assertion on page 13 of defendant's brief, that a

vendor cannot recover damages at law for an alleged breach of contract by the vendee, when upon the same facts a Court of Equity would not decree specific performance, it need only be remarked that the assertion is not supported by authority, and will not bear scrutiny.

The remedy by specific performance proceeds upon the theory that the contract is still in existence, and is sought by the party who adheres to it and desires to carry it into effect. He must, therefore, be himself ready and able to fulfill it in every detail. The suit for damages for a breach, however, is maintainable where one party has renounced the contract, and the other party takes him at his word, and likewise treating the contract as at an end, asks for the damages which he has suffered by reason of the breaking off of the contractual relation. The latter, therefore, need only show that he performed his full duty up to the moment of the breach. All else is excused him.

The oral argument of counsel for the defendants in support of the position that under certain sections of the Civil Code no damages can be awarded for the breach of a contract of exchange, is fully answered by a reference to Civil Code 1806, which applies all the provisions of the title on sale to exchanges, and enacts that each party has the rights and obligations of a seller as to the things which he gives, and of a buyer as to the things which he takes.

Of the cases cited by defendants' counsel, Doogood vs. Rose, 67 English Common Law Reports, 132, involved an alleged breach of contract under class "A," specified on page 4 of plaintiff's opening brief. It was an action for breach of contract of apprenticeship. The last section quoted in defendants' brief is mere dictum, as well as inapplicable to the case at bar. Wilmot vs. Wilkinson, 6 B. & C., 506, discussed therein, is in plaintiff's favor.

Goetz vs. Walters, 34 Minnesota, 239, Burke vs. Davis, 85 Cal., 110, were cases of options given for a purchase, not cases of a sale and purchase.

The other cases relied on by defendants have been discussed in our opening brief.

Lastly, on pages 25 and 26 of defendants' brief, appears a

quotation from a trial brief prepared by the plaintiff's attorneys, which extract defendants succeeded in getting incorporated in the bill of exceptions. We think that any extract of counsel's argument can have no place in a bill of exceptions for the reasons urged on the oral argument. Certainly this extract cannot be construed as an admission, and equally certainly if it can be considered at all, it must be read in connection with the whole of the plaintiff's brief and line of argument, so that the weight to be given to it can be ascertained from the full context.

June 24, 1897.

Respectfully submitted,

SIDNEY V. SMITH,

VINCENT NEALE,

Attorneys for Plaintiff in Error.

No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the Last Will and Testament of Edgar Mills, Deceased,
Defendants in Error.

APPLICATION FOR RE-HEARING.

SIDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

Filed ..... *1897.*

..... *Clerk.*

DEMPSTER BROS LAW PUBLISHERS BOND & GLEN PARK S F

In the United States Circuit Court of Appeals for the Ninth Circuit.

ALBERT E. GRAY,
Plaintiff in Error,
v.
S. PRENTISS SMITH *et als.*,
Defendants in Error.

APPLICATION FOR REHEARING.

SYLLABUS.

Whether the writing signed by Donohoe was a mere offer on his part, or a contract binding upon him without acceptance by Mills, must depend upon the facts attending its execution.

Under the California practice a judgment must be supported by positive findings upon all the issues. The doctrine of implied findings does not obtain in this State.

Therefore, if it was necessary to the judgment in this action to hold that the writing signed by Donohoe was a mere offer, the judgment should have been supported by a direct finding upon

the point; and, not being so supported, should be reversed.

The trial Court having failed to find that the writing was a mere offer, or to find facts from which such a conclusion would necessarily flow, and no such facts appearing in the bill of exceptions, this Court cannot, to support the judgment, make a finding which the trial Court did not make.

Even if the writing be regarded as a revocable offer, Mills was estopped from defending on that ground, because the circumstances of the transaction cast upon him the duty, as between himself and Gray, of accepting the offer, and he cannot be heard to complain that Donohoe was not bound, when it was within his own power and a part of his own obligation to bind him.

In the Court below there were five points under consideration in this case, and between the trial Court and the Appeal Court the plaintiff occupies the position of having won on each and every of the five issues, and yet lost his suit. (Gray v. Smith, 76 Fed. Rep., 525.)

The Court below gave judgment for defendants in error on the ground that plaintiff had failed to show that he had the "independent ability" to fulfill the contract on his part without the assistance coming to him on completion by or from the other party to the contract.

This was the only subject matter of appeal, and to this point, therefore, plaintiff's counsel directed their argument.

This Court, while declining to discuss the reason which actuated the trial Court in its decision, affirmed the judgment on a ground foreign to the appeal, and, as a substantive proposition, foreign even to the findings, and in the absence of a substantive or definite affirmative finding necessary to support the judgment under the requirements of the California Code of Civil Procedure. We do not of course question the right or duty of the Appeal Court to consider the whole of the findings, or its right to determine whether, upon a proper view of the law applicable thereto, the judgment is sustainable on other points not the immediate subject of appeal; but we are sure the Court will pardon us if we say, with the greatest respect, that the reason given by this Court for affirming the judgment, even if it were coincident with the evidence given in the trial Court, and even if there was an affirmative finding to support the judgment, does not seem to us to go the real issue, or to touch any vital point in this case.

We say "even if it were coincident with the evidence given in the trial Court" because it seems to us that the judgment depends upon a foundation of fact contrary to the evidence given in the trial Court, and unsupported by any affirmative finding thereon.

The evidence relating to the special point under appeal duly appeared in the transcript, but the entire and voluminous evidence given at the trial as bearing on side

issues not the subject of appeal of necessity did not appear in the transcript.

For the same reason there was no substantive "finding" of fact given by the Court on a point not deemed to be under dispute on appeal.

For a like reason the point was practically unargued.

We respectfully submit that the document signed by Donohoe, the groundwork for this Court's adverse decision to the plaintiff in error, cannot be considered from the standpoint of "construction" alone in order to determine its legal effect, or whether or no it is an "offer" merely or the "acceptance" of a *verbal offer* previously made. In the absence of evidence it may be a question of "construction," but, we submit, that it can only be construed in the light of the surrounding circumstances, the evidence relating to which is almost entirely omitted in the findings and transcript.

The "finding" that incidentally treats of this document (Finding VI, Transcript 34) says merely that Donohoe "executed a paper," and below, on same page, "the signatures to said instrument." In the actual, substantive description of this document, then, it is not found to be either an "offer" or an "acceptance" of an offer.

The decision and judgment are based upon the proposition that the paper signed by Donohoe was a mere offer, revocable until accepted by Mills, but that it was such a "mere offer" is nowhere affirmatively found by the trial Court. It is indeed referred to by the trial Court in the course of the findings as an "offer" or a "proposition," but this reference, by way of description or identification,

cannot be taken to be a finding upon the fact itself. Now, under the system of practice which obtains in the California Courts, a judgment must be sustained by affirmative findings upon every issue, and if there is a failure to find upon every issue necessary to support the judgment, the judgment must be reversed.

Majors v. Cowell, 51 Cal., 478.

N. P. R. R. Co. v. Reynolds, 50 Cal., 90.

Evidently, therefore, the findings being silent as to this point of fact, the judgment must be reversed, unless there is something in the paper itself or in the facts which are found by the Court below to warrant this Court in treating the paper as a mere offer.

Taking the paper by itself there is nothing to indicate or from which the Court could find whether it is an original offer proceeding without consideration from Donohoe, or an acceptance by him of an offer from some one else to buy upon the terms contained in the paper. If it was the latter, it was more than an offer ; it was an acceptance of an offer, and, just as it purports to be, an agreement to sell in consideration of the promise implied by a precedent offer coming from some one else, signed by the party to be bound thereby, and handed by him to the other contracting party in an envelope addressed to him, and thus identifying him and forming part of the document itself. (Finding top of page 34.)

And that this was the essential character of the "instrument" is not negatived by any of the facts so meagerly set forth in the findings which surrounded its execution. The findings simply show that Donohoe, Jr.,

being thereunto authorized by his father, signed and delivered to Cavanagh the paper in question. Now, if Cavanagh in fact offered Donohoe $165,000 and half the taxes for the current year for the property, and, to meet a scruple of Donohoe's, suggested and procured the insertion of Mills' name in the paper as that of the purchaser or ultimate grantee, it should need no argument or authority to show that no acceptance on Mills' part, nor on the part of anyone else, was necessary to bind Donohoe. The transaction then would have been one where there was a complete meeting of minds between the parties, who were in reality Donohoe and Cavanagh. An agreement arrived at between them by which Donohoe obligated himself to convey to Mills, and upon which both Cavanagh and Mills, or either of them, could have sued without further action on their part. The findings are silent as to all this, but the error of the decision of this Court lies in assuming from this silence that the paper was not produced in this way, while, on the contrary, it should reverse the judgment because, it being possible that the paper was produced in this way, the findings, to support the judgment, should have negatived such a possibility and found affirmatively that it was NOT produced in this way.

It is abundantly apparent throughout the findings that the document was accepted as a binding contract and acted upon and treated by all parties to the transaction, throughout all the ordinary incidents attending a purchase and sale, not as an "offer," but as the acceptance of an offer—the contract for sale resulting from an offer

and acceptance. Mills' attorneys referred to Mills' "obligation" thereunder (Transcript, pages 40–41), and Donohoe's attorneys—in order that Donohoe might get quit of his recognized obligations thereunder—tender a deed to Mills and to Gray and to Cavanagh. In short, the whole transaction was absolutely *bona fide* and free from all suspicion of fraud; cordially and unequivocally acquiesced in and acted upon by all parties to the transaction—Cavanagh, Gray, Mills and Donohoe, and their several attorneys — after each party thereto had full notice of every phase of the negotiations, money differences, everything in connection therewith. Not only was judgment affirmed on a point foreign to the appeal, foreign to the findings, and upon a transcript of the evidence necessarily incomplete and misleading on a point not deemed to be under present consideration, but the point has been practically unargued.

With the greatest respect, we are confident that the point cannot stand when brought to the test of argument, and that a great injustice will be done if it be not reviewed.

Says this Court: The paper signed by Donohoe was, in legal effect, a mere offer to sell to Mills, and was not binding upon Donohoe until accepted by Mills. At any time before acceptance it could have been recalled by Donohoe. It never was accepted by Mills nor by any one else, and therefore it never obligated Donohoe nor gave the plaintiff a right to compel a conveyance to Mills nor to himself. Therefore the judgment should be affirmed. Now it does seem to us that the legal effect of this document, as stated by this Court as above, depends

entirely upon whether the document was an "acceptance of a verbal offer" or a mere "offer to sell;" this is a matter of evidence, and the trial Court who heard and considered the evidence did not venture to give judgment against the plaintiff on this point.

We are, however, quite willing to take up the argument upon the basis that the Donohoe document was an "offer" to sell and not an acceptance of a verbal offer, and for the time being, for the sake of viewing it from this aspect, will thus concede.

When thus viewed it seems to us that some of the most important considerations which we attempted to present in the argument already made in this case, have been ignored. The opinion rendered by the Court certainly does not advert to those considerations, and for this reason, and, moreover, because we are convinced that they are and should be controlling (when viewed from this standpoint) and also because we fear that our remarks may have escaped the attention of the Court, we venture to file this petition for a rehearing.

For the sake of argument, grant then that the paper signed by Donohoe was a mere offer, grant even that Gray himself could not have obtained under it a right to compel Donohoe to convey to himself or Mills, does it therefore necessarily follow that Gray has no right of action against Mills? Is that all there is in this case? Does that conclude the whole matter? Are there no equities, no estoppels, which should prevent Mills from defending this action upon any such ground as is now made the basis of the Court's judgment?

Grant, for sake of argument, that Donohoe never became bound to convey to any one. Grant likewise that Gray could not have brought himself into such relations with Donohoe as would have enabled him to force Donohoe to convey. The fact still remains, and it is a fact not even alluded to by this Court, that the whole situation lay completely in Mills' power, and that *the offer never having been withdrawn by Donohoe*, it was always in Mills' power to accept Donohoe's offer and obtain the title. Although, as between Mills and Donohoe, we will likewise grant, for sake of argument, that Donohoe was not bound to convey, and Mills was not required to accept the offer, was there nothing in the whole transaction which, as between Mills and Gray, obligated Mills to accept Donohoe's offer, and to get and take title in that way? We confidently maintain that there was. Mills agreed with Gray that he would buy and pay for the Market street lot. He was at once informed (by copy of the paper in question) that the title was to come from Donohoe under the latter's obligation to convey to himself. Instead of demurring to this form of the transaction, as perhaps he might have done, he acquiesced in it, and submitted the abstract to his attorney. At any moment, if he chose to do so, he could have notified Donohoe of his acceptance, and obtained through Gray, *and by reason of his contract with Gray*, the right to compel a conveyance to himself. This power he did not exercise because the title was rejected, but the title has been found to have been good, and therefore Mills' refusal to go on stands, as a matter of law, without any

legal justification. From a legal standpoint it was arbitrary and unexcused, unless excused by the reason which has induced this Court to affirm the judgment. Putting aside, then, the reason which actuated Mills, which was no reason, how does the matter stand? Mills, in effect, took this position, or it is now taken for him by the Court: "It is true, Gray, that I agreed to buy from you and pay for the lot; it is true that I have taken from you in satisfaction of our contract, and without demur, an offer running to me directly, and that I did not require you to put the transaction into some other shape, it is true that I can, if I wish, at any time notify Donohoe that I accept his offer, and thus obtain everything which you agreed to give me, and enable you to fulfill your engagement with me; but I decline to do so, and my reason for declining is that formally and technically I, and not you, are the one who can bind Donohoe."

Will this Court say that that is an equitable position? Was it right and fair and honest that Mills should have it in his arbitrary power, at his mere caprice, just as it suited or did not suit his views of his own interest, to get the benefit of the transaction, to make all the profits to be derived from it, or throw it up when and as he pleased? Was it a one-sided arrangement this, by which all the chances of gain were with Mills, under which he could have sued Gray for damages if Donohoe had refused to convey or the title had proved to be bad, and yet from which Mills could escape if he thought the chances of loss were the stronger ones? Was there no mutuality of ob-

ligations, were there no duties imposed upon Mills by his conduct and the course of the transaction?

We believe that these questions answer themselves, and that there can be no proper solution of this case by any reasoning which leaves out of view all the relations of all the parties, or which is based, as the opinion rendered by this Court seems to be, upon a view of the relations of Mills and Donohoe alone towards Donohoe's offer, and not upon a consideration of the relations of Gray and Mills, growing out of their contract, their conduct, and the part which Donohoe's offer played in the transaction between them. Once more we urge upon the Court that the fact that the offer ran to Mills and not to Gray was a matter of form and not of substance, and that, as it gave to Mills the power to get the title by a simple act of acceptance which he should have performed, he was estopped from taking advantage of his own wrong and from asserting that Donohoe was not bound to convey, when the only reason why Donohoe was not bound to convey was because Mills himself refused to bind him.

All of which is respectfully submitted.

SIDNEY V. SMITH,

VINCENT NEALE,

Attorneys for Plaintiff in Error.

Certificate of Counsel.

We, the undersigned, counsel for plaintiff in error, certify that in our judgment, and in the judgment of each of us, the foregoing petition for a rehearing is well founded, and we certify that it is not interposed for delay.

SIDNEY V. SMITH,

VINCENT NEALE,

Counsel for Albert E. Gray, Plaintiff in Error.